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IN THE

Supreme Court of the United States

——————— TERM, 1971

Supreme Court No. .....

Court of Appeals No. 20714

JOHNNEY BENJAMIN,
Petitioner,

v.

ELLIOTT RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, by his attorneys, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on April 29, 1971.

Petitioner asks that this Petition be considered along with that in *Lofty v. Richardson,* Supreme Court No. 1758. The Petition in *Lofty* was filed on May 28, 1971. Counsel for petitioner *Lofty* concurs with this request.

OPINIONS BELOW

Said opinion and judgment of the United States Court of Appeals for the Sixth Circuit is not yet officially reported. (See Appendix A, pp. 33-35). Petitioner, in accordance with Rules 23[1] (a) and (i) also includes the following opinions in Appendix A: 1. July 13, 1970 Order of District Court Judge Damon Keith Denying Motion for Rehearing of Plaintiff's Motion for Summary Judgment,....F. Supp. .... (E.D. Mich) (pp. 43-48); May 20, 1970 Memoranda Opinion and Order of Judge Keith.....F. Supp.... (35-43); March 17, 1969 Decision of Appeals Council (48-53); December 3, 1968 Decision of Hearing Examiner Fenster (53-60); and April 12, 1968 Decision of Hearing Examiner Ferguson (61-69)[2] Petitioner also therein includes the lower Court opinion in the companion case of *Lofty v. Richardson, Supreme Court* No. 1758 *certiorari* to 440 F. 2d 1144 (6th Cir. March 4, 1971) (70-84). Another companion case is *Belcher v. Richardson,* Supreme Court No. 1091 appeal from 317 F. Supp. 1294 (S.D. W. Va., 1970). This Court agreed to hear *Belcher* on March 1, 1971.

---

[1] Petitioner will herein usually be called "claimant." Petitioner was often referred to as "plaintiff" before the District Court. Respondent will usually be called "the Secretary."

[2] Petitioner only includes the portion of the first Hearing Examiner's Decision relevant to the last question presented to this Court. This portion shows claimant's combined earning from two jobs (65).

JURISDICTION

The jurisdiction of this court is invoked under Title 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the total "redemption" settlement received by claimant a lump sum payment exempt under Section 224 (b) from the reduction provisions of Section 224(a) of the Social Security Act?

2. Assuming *arguendo* that claimant's total "redemption" settlement was not exempt under Section 224 (b) of said Act, should the Secretary have allocated part of claimant's lump sum settlement to future medical expenses rather than strictly limiting claimant's lump sum settlement to substitute for weekly payments, past medical expenses and attorneys fees?

3. Does Section 224 of the Act, as construed by the Secretary, deprive claimant of property without due process of law in that it arbitrarily discriminates against workmen's compensation claimant who has paid into the trust fund the same amount of money as other claimants and by effectively nullifying claimant's private settlement agreement.

4. May the Secretary fail to apply Section 159 of Public Law 90-248 in computing the earning of claimant, who had been working two jobs when injured?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 224 of the Social Security Act [Title 42, U.S.C. Section 424a], Section 159 of Public Law 90-248, and the Fifth Amendment to the Constitution of the United States. The relevant portions of the Statute are included in Appendix B.

STATEMENT OF THE CASE

Claimant was shot in the back on April 20, 1966 while employed by the Log Cabin Bar in Detroit, Michigan. (53, 65) He received Workmen's Compensation benefits from April 20, 1966 through April 1, 1967, which included weekly payments of $58.13 and furnishing of hospital and medical care. The benefits received by plaintiff were voluntarily paid by his employer's Workmen's Compensation insurer, and no determination of his employer's liability for such benefit was ever made under the Michigan Workmen's Compensation Act. (56)

A dispute arose between claimant and his employer's insurer over the correct amount of his weekly compensation payment, and claimant filed an application for adjustment of claim with the Workmen's Compensation Department. While his application was pending, claimant's weekly benefits were terminated by his employer's insurer. The employer's insurer filed an Answer to claimant's application denying all liability. Settlement negotiations were then carried on between attorneys for the parties. Thereafter, on September 7, 1967, the Michigan Workmen's Compensation Department approved a *"redemption" settlement agreement* entered into by the claim-

ant and his employer's insurer *providing for the lump sum payment to him of $10,000.00.* On September 27, 1967, payments were made by the employer's insurer pursuant to said redemption agreement. (53, 56, 57)

Claimant was working two jobs when shot. (65) His regular day-time job was at a car dealer's and he also worked evenings at the bar. *His combined monthly earnings at his two occupations before his injury were $709.00.* (65) The monthly combination of full workmen's compensation and Social Security disability benefits would be only $372.90.

Claimant was found to be disabled in the decision of Hearing Examiner Milton C. Ferguson on April 12, 1968 (69) He thereupon became entitled to benefits on his application for a period of disability and for disability insurance benefits. Thereafter, his disability benefits were reduced because of the receipt of Workmen's Compensation benefits. The reduction was predicated on Section 224 of the Act (85-89) *Claimant* sought review of the reduction in his benefits. Examiner Fenster *found* in part:

> "*. . . this lump sum award had all the earmarks of a settlement of a lawsuit rather than a substitute for periodic payments.*" (58; emphasis ours)

The Examiner concluded that claimant was entitled to his full benefits without reduction. (60)

Thereafter, the Social Security Administration Appeals Council on its own motion reversed the decision of Hearing Examiner Fenster, and applied the reduction provisions of Section 224. (48-53)

Although evidence of claimant's two jobs and of his combined earnings was presented to *the Appeals Council,* it *did not recompute claimant's average monthly earnings*

from and after February 1, 1968, as required by Section 159 of Public Law 90-248.

The decision of the Appeals Council became the final decision of the Secretary subject to review under Section 205 (g) of the Act. [Title 42, U.S.C. Sec. 405(g)] Claimant brought an action in the District Court against the Secretary challenging the decision that his disability benefits were subject to reduction pursuant to Section 224. Claimant's action further challenged the Secretary's failure to apply Section 159 of Public Law 90-248 in computing plaintiff's earnings.

Claimant and the Secretary both Moved for Summary Judgment. The District Court, on May 28, 1970, denied claimant's Motion and granted the Secretary's Motion for Summary Judgment. (35-43)

Claimant, pursuant to Rules 52 (b) and 59 (a)(2) of the Federal Rules of Civil Procedure, Moved the District Court to amend its Findings and Judgment and for a New Hearing. The Court, on July 13, 1970, denied claimant's said Motion and denied his request for Oral Argument. (43-48)

Claimant then appealed to the Court of Appeals. That Court, on April 12, 1971, in a *Per Curiam* Order, affirmed the District Court's judgment. (33-35)

The Secretary had contended that the lump sum exemption provision of Section 224 (b) was limited to medical expenses and to legal fees. The Court of Appeals held that a Michigan "redemption" settlement *always* constitutes *in part* a commutation of periodic compensation payments. The Court held that claimant's Social Security benefits may be reduced by his *entire* lump sum Workmen's Compensation settlement, except for the unpaid medical expenses and attorneys fees, which the Secretary had deducted. The Court did not attribute any of claimant's set-

tlement to future medical expenses, saying that claimant had not proven the amount of said future expenses.

The lower Courts rejected claimant's constitutional arguments, basing their decisions on *Lofty v. Richardson,* petition for certiorari pending before this Court in Case No. 1758. (440 F.2d 1144, 1971, and 325 F. Supp. 285, 1970)

The Court of Appeals ignored the Secretary's failure to recompute claimant's earnings, because of his second job, as required by Section 159 of Public Law 90-248.

REASONS FOR GRANTING WRIT OF CERTIORARI

Important Federal Questions are Presented By The Lower Court's Construction of Section 224 of the Social Security Act, Important Constitutional Questions are Presented by Said Section 224 Itself, and This Court is Considering Cases Involving The Constitutional Questions

A. This Court Should Settle the Meaning of Section 224 of the Social Security Act.

These Statutory construction issues were present but were not litigated in *Lofty, supra.* The only question presented to this Court in *Lofty* is similar to Petitioner's question No. 3, *supra.*

1. A Michigan "Redemption" Settlement is Not a Commutation of or a substitute for Periodic Payments.

The Michigan Workmen's Compensation Act allows a commutation of or a substitute for periodic payments by means of a "lump sum advance;" Part II, Section 22 of the Act provides in part:

> ". . . [S]aid compensation commission may at any time direct in any case, if special circumstance be found which in its judgment require the same, that the deferred payments due under this Act be commuted on the present worth thereof at 5 per cent per annum to 1 or more lump sum payments." (Mich. Comp. Laws, Sec. 412.22; Mich. Stats. Ann. Sec. 17.172)

Had claimant received a "lump sum advance" pursuant to the above statutory provision the Secretary would have acted correctly in applying the reduction because the "lump sum advance" would have been a commutation of, or a substitute for, periodic payments.

However, under Michigan law the payment received by claimant was not a commutation of, or a substitute for, periodic payments; claimant received a lump sum by way of a "redemption" settlement which is an entirely different concept under Michigan law.

With respect to a "redemption" the Michigan Workmen's Compensation Act provides in Part II, Section 22 as follows:

> "[Any liability resulting from an injury] may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the commission, . . ." (M. S. A. 17.172).

The difference between the "redemption" under Michigan law and the "lump sum advance" include the following:

(1) The *"redemption" constitutes a settlement in full* of all rights of claimants of actual and possible liability of employers in regard to not only weekly benefits, but *medical and hospital expenses, cost of nursing care and rehabilitation through vocational training, as well, for his entire life. Wehmeier v. W. E. Wood Co.*, 377 Mich. 176, 139

N. W. 2d 733 (1966). In contrast, the "lump sum advance" covers weekly benefits *only* and is a commutation of substitute for such periodic benefits.

(2) The "redemption" is like an out of court settlemest of a contested claim; the amount agreed upon is a negotiated compromise and considers many factors, including the question of liability. In contrast, the "lump sum advance" is directly and solely a commutation of deferred weekly benefits based on their present worth at 5% per year;

(3) The "redemption", when approved, allows attorney fees of up to 15% of the amount of the settlement under Michigan Workmen's Compensation rules; in contrast, the attorney fee in connection with the lump sum advance is entirely discretionary with the Hearing Referee who considers it; in practice either no fee is allowed or a mere nominal fee is permitted.

The Michigan Supreme Court, in *Wehmeier v. W. E. Wood Co., supra* held that a "redemption" settlement, under Michigan law, was not the same as a "lump sum advance" of weekly Workmen's Compensation payments. The Court of Appeals, while purporting to rely upon *Wehmeier, supra,* holds that a Michigan redemption settlemen is always at least in part a "commutation of, or substitute for, periodic payments" for purposes of Sections 224(a) and (b) of the Social Security Act. (34) Thus, the Court of Appeals' construction of Michigan law conflicts with the holding of the highest Court of Michigan.

The decisions of the Secretary and the Court of Appeals are contrary to and, in effect, nullify the specific language of Subsection 224(b). If this lump sum redemption settlement is a "commutation of" or a "substitute for" periodic payments, then *any* lump sum would be. This, in effect, nullifies the 'lump sum proviso."

2. The Secretary and the Lower Court Limit "Lump Sum" in Section 224 to Claimant's Attorneys Fees and Past Medical Expenses

The Court of Appeals, in this case accepted the Secretary's argument that the "lump sum" exception be limited to claimant's attorneys fees and medical payments. This argument is faulty. If Congress had so intended to limit "lump sum," then it could easily have said so. Other statutes, such as the Michigan Workmen's Compensation Act, specifically deal with medical payments. Furthermore, "lump sum" is broader than the meaning suggested by the Secretary in other parts of the Social Security Act. (See, e.g., Sec. 202(n)(1)(c) in regard to "lump sum death payment.")

The mischief inherent in the Court's Order is apparent from its conclusion that a Michigan redemption settlement "always constitutes *in part* a commutation of periodic payments." (34) That means that the lump sum exception is written out of the Act for all Michigan workers.

Petitioner submits that the Court errs by holding that part of every Michigan redemption settlement is a substitute for periodic payments. But assuming *arguendo* that the Court is correct, this cannot justify the Court's conclusion that claimant's *entire* redemption settlement (less attorneys fees and *past* medical expenses) should be treated as a commutation of or substitute for periodic payments. The lower Court holds claimant responsible for not having proven what part of his redemption settlement was made up of future medical expenses, thereby also winning exclusion of them from the reduction computation. This would have required claimant over a year after the settlement was consummated and when claimant

appeared before the Hearing Examiner or two years later when the matter came before the District Court, to show what part of the settlement was apportioned to *future* medical expenses. Such an undertaking would have been sheer deception and pure speculation because the nature of this redemption settlement precludes an apportionment by the weekly payments and medical expenses.

Other Courts place this burden on the Secretary. The identical issue was involved in *Slone v. Finch*,. . . .F. Supp. . . . ., CCH Un. Ins. Rep. Para. 16,093 (S. D. Ohio; November 27, 1970). Claimant Slone received a lump sum settlement of $8,000 under the Ohio Workmen's Compensation Act. Two thousand dollars had been paid by claimant as attorney's fees. The Secretary concluded that the entire $6,000 remaining was a commutation of periodic payments and, thus, substantially reduced claimants Social Security disability benefits. Judge Hogan grapsed this issue and, in a well reasoned opinion, stated in part:

> "It is quite clear to this Court that if the Commission makes a given award to a given person for a given number of weeks and thereafter, on application, the Commission commutes that to a lump sum payment, then the lump sum payment is merely a commutation of or substitute for periodic payments as that term is used in Section 424 and would clearly furnish the basis for an appropriate deduction.
>
> The other section and the one specifically involved in this case is Revised Code Section 4123.65. This section is entitled, 'Application for final settlement.' . . .
>
> As we pointed out initially, this is an unusual situation. *Gambill v. Finch*, 309 F. Supp. 1 (E.D. Tenn., 1970) is a pure and simple commutation case. The same is true of *Ladner v. H.E.W.*, 304 F. Supp.

474 (Miss., 1969). In other words, in the *Ladner* case the Act itself as applied to the facts settled the periodic payments and, after the periodic pay ments had been settled, the commutation took place. *In this record there never occurred any event based on which either the period involved in a periodic payment or the amount involved in a periodic payment was determined. The only thing that was determined in this case by the action of the Commission was that $8,000.00 was a fair amount to pay,* not in any communtation, but *in exchange for a release of whatever claim it was this plaintiff made.* We point out that the *claimant, as part of this settlement, not only released any basic claim he had for periodic payment but also released any claim which he might ever have in the future for any medical or hospital expenses. . . .*

The Secretary has made no finding in respect of how much of the settlement amount represented a 'substitute for' periodic payments and how much represented a 'substitute for' *future* 'lump sum' *payments for medical expense."* (at pp. 2167, 2168; emphasis added)

The Court remanded the case to the Secretary. The U. S. Attorney served notice of appeal in January, but withdrew it in February, 1971. The Judge's distinction between the two Sections in the Ohio Statute is similar to the distinction made by the Michigan Supreme Court in *Wehmeier, supra.* The Court of Appeals here overlooked such distinction.

Ironically, District Judge Keith, who had decided the instant case, issued a later decision which reaches the same result as in *Slone, supra.* In *Miley v. Finch,.... F.* Supp....., CCH Un. Ins. Reps. Para. 15,848 (E.D. Mich. June 12, 1970), the Court rejected claimant's constitutional arguments, relying upon his decision in the instant

case and upon *Lofty, supra.* But the Court remanded the case to the Secretary, holding in part:

> "Finally, plaintiff argues that *the secretary failed,* prior to applying the offset provisions of the act, *to reduce the amount of the redemption by any payment for future medical expenses* included in the settlement agreement . . .
>
> It is unquestionably the law in Michigan that *a redemption amount encompasses payment of weekly benefits and all past and future medical expenses.* See *Wehmeier v. W.E. Wood Company* (1966) 377 Mich 176.
>
> If such is the case in Michigan, then, *prior to any application of the offset provisions* of the Social Security Act, *a determination must be made on each redemption amount as to what portion represents* a commutation of our substitute for periodic payments and what portion represents *settlement for past and future medical expenses.*
>
> The record in this matter contains no such determination; at best the transcript contains a 'Report of Contact, Workmen Compensation Payment Report' from the Lansing, Michigan District Office, stating the conclusion that the amount of $5,929.15 excludes 'medical and/or attorney's fees.'
>
> As the record is void of evidence to support this conclusion, which apparently was adopted by the Secretary, there is no basis in fact on which this Court may affirm this decision. Therefore, as to this third issue, *the matter must be reversed and remanded so that the Secretary may, with the assistance of evidence submitted by the plaintiff* or the Workmen's Compensation Board, make a *determination* as to *what portion of the redemption amount constituted a* commutation or substitute for periodic payments and what portions represents *payments for* past and *future medical expenses.*

> It seems to this Court that, *in view of the decision of Wehmeier, supra, such a determination would be required in every case where a redemption amount effectuates an offset.*" (Emphasis added; at 2499)

In the instant case, the Secretary deducted some lawyer's fees and an amount for *past* medical expenses from the offset. The Secretary neglected claimant's *future* and *present* medical expenses. District Judge Keith, in ruling for the Secretary in the instant case, treated plaintiff Miley better than petitioner herein.

3. The Lower Court's Construction of Section 224 Conflicts with this Court's Rules of Statutory Construction and with the Purposes of the Statute..

The errors inherent in the Secretary's and the Court of Appeals decisions go beyond doing violence to the language of the Act. Said decisions are also contrary to the purposes of the Social Security Act and to this Court's rules of Statutory construction.

This Court discussed the history of the Act and its beneficial purposes, paritcularly in regard to its unemployment and old age portions, in *Charles C. Steward Mach. Co. v. Davis,* 301 U.S. 548, 586-588 (1937), *Helvering v. Davis,* 301 U.S. 619, 641-645 (1937), both opinions by Mr. Justice Cardozo, and in *United States v. Silk,* 331 U.S. 704, 710 (1947), by Mr. Justice Reed.

The purpose of the disability benefits portions was discussed in *Sayers v. Gardner,* 380 F. 2d 920 (6th Cir. 1967), in part as follows:

> "Because of the repeated necessity of reversing the Secretary in these cases, we should go back to

the origins of the Statute and consider first things first. *The Act was adopted* pursuant to a public policy unknown to the common law, *designed for the protection of society, and enacted to alleviate the burdens* which rest on large number of the population because of the insecurities of modern life, *particularly those accompanying* old age, unemployment and *disability, through the establishment* in advance *of a* provident *fund for the needy worker, out of which he will be paid disability benefits,* annuities, and compensation; and there is no question that the Social Securities Act is constitutional."

* * * * *

"The Social Security Act brought with it, among other provisions, *the right to disability benefits for workers who have become disabled from doing the work*—usually the hard manual work—that they have done during their lives.

"In *McGaha v. Ribicoff,* 262 F. Supp. 161, 167, the court, in a case involving disability benefits under the Social Security Act reversed the Hearing Examiners and states. . . .

* * * * *

" 'Pinched by poverty, beset by adversity, driven by necessity, one may work to keep the wolf away from the door though not physically able to work; and, under the law in this case, the fact that the woman worked to earn her living did not prevent a jury from finding, from the evidence before it that she was totally and permanently disabled even while working.' " (at 942 of 380 F. 2d; emphasis supplied)

The Court in *Sayers,* reversed the District Court's affirmance of a denial of disability payments and directed that benefits be paid.[3]

---

[3] The Court discussed the large percentage of times in which the Secretary has been reversed in disability cases as bearing upon the standards of judicial review (at 942 and 943).

This Court and most other Courts hold that the purpose of legislation governs its interpretation. See, for example, *United States v. American Trucking Assn.*, 310 U.S. 534, 543, 544 (1940); and see *The Legal Process,* by Professors Henry Hart and Albert Sacks, at pp. 1082 and 1339 of 1957 Cambridge Tentative Edition).

The view of the Secretary, as upheld by the Court of Appeals, is contrary to the beneficial purposes of the Social Security Act and its Section 223 providing for disability benefits. It also nullifies the Section 224(b) "lump sum" exception. (See discussion, *supra,* at p. 9)

The Secretary's decision does not even square with the presumed purpose of Section 224(a)—that is to avoid duplication or pyramiding of benefits so that an individual cannot receive more money in a combination of benefits than he would have received if he continued to work. The application of the Section in this claimant's case does not accomplish the legislative purpose; he had two jobs and the addition of Social Security benefits to his lump sum compensation settlement would not come close to his lost income. (See Statement of the Case, *supra,* at pp. 4, 5)

In the case at bar, the court broadly construed an exception to receipt of benefits (i.e., the Workmen's Compensation offset); the Court narrowly construed the Subsection 224(b) lump sum exclusion from this offset. And, finally the Court broadly construed 'commutation" or "substitute" in Subsection 224(b). The Court's aforedescribed standards of construction are *all* contrary to the general rule of construing a beneficial statute liberally or broadly to *allow* benefits and narrowly construing its disqualifying provisions, or those which might reduce benefits. 82 Corpus Juris Secundum, "Statutes," Section 382 (at 891-894). In this respect, *the lower Court's decision is contrary*

to the decisions of this Court, to the decisions of other Circuit Courts and even to its own earlier decisions. See, for example, *United States v. Silk*, 331 U.S. 704, 712 (1937); *Schwing v. United States*, 165 F. 2d 518, 520, 521 (3d Cir. 1948; and *Ewing v. Black*, 172 F. 2d 331 (6th Cir. 1949); compare *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1965).

Delno v. Celebrezze, 347 F. 2d 159 (9th Cir. 1965), was an appeal from a judgment sustaining the decision of the Appeals Council which had denied plaintiff's application for old-age insurance benefits under Section 202(a) of the Act. (At 161) The Court of Appeals vacated said judgment. In regard to construction of the Act, the Court said, in part:

> "The record indicates that the Appeals Council applied the 'services to occupant' exception narrowly, and included borderline items in the rental exclusion. *The general statutory preference for coverage would seem to require the opposite approach.*" (At 165; emphasis ours)

See also, *Davidson v. Gardner*, 370 F. 2d 803, 807, 808 (6th Cir. 1967).

Claimant here has had Social Security taxes taken out of his pay. To deny coverage or to reduce it by something which he would have received anyway is to reach an absurd and unfair result. Statutes, where at all possible, must be construed to avoid such a result. See, for example, *U.S. v. American Trucking Assn., Inc.*, 310 U.S. 534 and *St. Luke's Hospital Association of Cleveland, Ohio v. United States*, 333 F. 2d 157, 163, 164 (6th Cir. 1964). Compare *Reynolds v. Gardner*, 271 F. Supp. 676 (W.D. Va 1966), affirmed 381 F. 2d 380 (4th Cir. 1967).

Neither defendant Secretary nor the lower Courts gave any sensible meaning to the term "lump sum" in Section 224. Based upon the Statutory construction issues alone, this Court should hear this case.

B. Section 224 of the Social Security Act is Contrary to the Fifth Amendment of the United States Constitution. This Court has Other Cases involving these issues before it.

Section 224, as construed by the Secretary, deprives Petitioner of property without due process of law in at least two respects:

1. It unreasonably discriminates against claimant petitioner as compared with other disabled workers who paid Social Security taxes and who received their full disability benefits under the Social Security Act; and 2. It effectively nullifies claimant's private settlement agreement by taking Social Security disability benefits away from claimant, in an amount equal to what he receives under said settlement agreement. These issues present important Federal questions.

1. Arbitrary Discrimination.

The first constitutional issue is the same as is before this Court in *Belcher v. Richardson,* Case No. 1091, reviewing 317 F. Supp. 1294 (S. D. W. Va. 1970), *Bartley v. Richardson,* Case No. 103, seeking review of 311 F. Supp. 876 (E. D. Ky. 1970) and *Lofty v. Richardson,* Case No. 1758, petition for *certiorari* pending.

In *Belcher,* the United States District Court for the Southern District of West Virginia held:

> "In sum, therefore, it is held that in the circumstances of plaintiff's case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments."

In *Lofty* and *Bartley,* the lower Courts, as in the instant case, upheld the Section's constitutionality. Thus, this Petition should be granted to help resolve the conflict in the decisions of our Federal Courts on this question.

In order that petitioner's rights be fully protected, petitioner requests that this Petition be considered with the Petition in *Lofty, supra,* and that this Court hear this case so that this case can be decided along with said other cases pending before this Court.

Claimant has been required by law to make certain Social Security tax contributions over a period of years while engaged in covered employment. These contributions in part have been placed in the Federal Disability Insurance Trust Fund created by Congress. [Title 42 U.S.C.A. Sec. 401(b)]

Claimant suffered a work-connected injury for which he received a monetary settlement. Congress directs that his Social Security Disability Benefits from the trust fund shall be reduced because of the receipt of workmen's compensation benefits. Another person, who has made the same Social Security tax contributions to the trust fund, may suffer a disability which is not work-connected in origin and for which he receives a private settlement; the Act permits him to receive full Social Security Disability Benefits out of the trust fund.

Such a difference in treatment between persons required to make the same Social Security tax contributions

to the trust fund is unreasonably discriminatory resulting in an arbitrary reduction in disability benefits. As such, Section 224 of the Social Security Act is unconstitutional as an infringement of claimant's rights not to be deprived of property without due process of law guaranteed to him by the Fifth Amendment to the United States Constitution. (U.S.C.A. Constitution, Amendments 1 to 5, p. 482.)

If the intent of Congress in enacting Section 224 was to avoid duplication and pyramiding of benefits so that an individual cannot receive more money in combination of benefits than he would have received if he continued to work (Hearings before the Committee on Finance—United States Senate on H. R. 6675, pp. 146-151 [Part I]), it was arbitrary to reduce Social Security benefits by Workmen's Compensation, because such compensation is a public-borne cost of industry. As such, it is owed the individual by his employer or by his employer's private insurer under the public policy to compensate him for injury suffered in the service of our modern industrial society. See the quote from *Belcher v. Richardson, infra* at page 26.

At the same time, the worker is individually taxed to build a separate trust fund under Social Security out of which disability benefits may be paid to him. His Social Security tax contributions are self-borne, not as a voluntary but as a mandatory supplemental insurance program required by law. Under these circumstances, should not claimant be entitled to both benefits, in full, even at the risk of receiving more in benefits than he did in prior earnings? The savings otherwise accumulated or the benefits of a private disability insurance policy but for the tax would have been available to him. Moreover, it is submitted that the feared "pyramiding" is more a theory than a practical reality. In most cases, full Social Security Disability Benefits would simply close the gap to insure dur-

ing disability continuing income about the size of previous earnings and in a few cases would it exceed by any substantial sum the full average weekly earnings of the man before injury.

Claimant has been permanently injured. He will suffer pain and physical impairment the rest of his life. Surely some portion of his redemption settlement and of his Social Security benefits is "compensation" for this injury.

Finally, *in this claimant's case the combined workmen's compensation benefits and Social Security benefits would be $336.10 less than his total earnings from both jobs before injury.* (65) *The Secretary's failure to recompute claimant's earnings to reflect his second job, makes the application of Section 224(a) to this claimant especially harsh and arbitrary.*

In analyzing the alleged reasonableness of a classification made in a statute, a court must look to the purpose of the statute involved. As Justice Brandeis said, while dissenting in *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389 (1928):

> ". . . *the classification must insist upon a difference which is real,* as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that *the obect of the classification must be the accomplishment of a purpose or the promotion of a policy,* which is within the permissible functions of the State; and that *the difference must bear a relation to the object of the legislation which is substantial,* as distinguished from one which is speculative, remote or negligible. . . ." (At 406, emphasis supplied).

The majority held that the classifications in the Statute were not "based on a real and substantial difference hav-

ing reasonable relation to the subject of the legislation." (At 402).

Compare *Porter v. Shibe,* 158 F. 2d 68, 73 (10th Cir. 1946), where the Court relied upon *Nebbia v. People of State of New York,* 291 U.S. 502, 525, (1933), and *Fox v. Michigan Employment Sec. Commis.,* 379 Mich. 579 (1967).

The determination of whether a Federal law is unconstitutionally unreasonable within the Fifth Amendment is similar to the question of the validity of state action within the Fourteenth Amendment's equal protection clause. See, for example, *Bolling, et al v. Sharpe, et al,* 347 U.S. 497, 499 (1954).

In *California Dept. of Human Resources Development, et al v. Java, et al,*....U.S....., 39 Law Week 4491 (Case No. 507; April 26, 1971), this Court unanimously voided Sections of the California Unemployment Insurance Code which were contrary to the *purposes* of the Federal unemployment insurance program as expressed in Section 303 (a)(1) of the Social Security Act. [Title 42, U.S.C.A. Sec. 503 (a)(1)]

We have seen, *supra,* that Section 224, as construed by the Secretary is contrary to the purposes of the Social Security Act, and its Sections 223 and 224. For this reason, Section 224(a) cannot stand as against the standards for constitutionality which Federal and state laws must meet.

2. Impairment of Contractual Obligations

The second part of constitutional issue has not yet been discussed in the cases before this Court.

The due process clause of the Fifth Amendment projects persons, such as claimant from Federal action which impairs contractual obligations.[4] In this regard, it is stated in 16A Corpus Juris Secundum, "Constitutional Law," Section 610:

> *"In general valid contracts are property and cannot be interfered with without due process of law,* and this rule applies whether the obligee is a private individual, a municipality, a state, or the United States." (At p. 740; emphasis supplied)

Claimant entered a valid settlement agreement with his employer's insurance company as a result of injuries suffered by claimant. The Secretary, by his erroneous construction of Section 224 of the Act, takes away disability benefits otherwise due claimant because of said private settlement agreement. This action attaches a new disadvantage or liability to claimant's settlement agreement. This agreement is, in effect, nullified just as if Congress had passed a law requiring any person who receives health or accident insurance benefits to pay an equivalent amount to the United States Treasury Department.

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[4] Compare Article I, Section 10, and the Fourteenth Amendment due process clause as to *state* action which unreasonably affects contracts.

3. The Rights-Privilege Distinction of Flemming v. Nestor, Upon which the Lower Court Opinions in Lofty and in the Instant Case are Based, Has Been Abandoned by this Court.

The lower Courts, in dismissing claimant's Constitutional arguments, merely cited the opinions in *Lofty v. Finch,* 325 F. Supp. 285, (E.D. Mich. 1970), affirmed 440 F. 2d 1144 (6th Cir. 1971). The *Lofty* case is now before this Court in Case No. 1758. First, *Lofty* does not involve a person who, as claimant in the instant case, had two jobs when disabled. Thus, in this case, the arbitrariness of the Secretary's construction of the Act is even more apparent. Secondly, *Lofty* is wrong.

The Courts in *Lofty,* primarily relied upon *Flemming v. Nestor,* 363 U.S. 603 (1960), in rejecting plaintiff Lofty's Constitutional arguments.

In *Nestor, supra,* the District Court (169 F. Supp. 922) held Section 202 (n) [42 U.S.C. Sec. 402(n)] unconstitutional. That Section terminates Social Security Old Age benefits payable to a deported alien. The Supreme Court, with present Justices Black, Brennan and Douglas dissenting, reversed the District Court. The majority opinion was mainly based upon its view that citizens do not have an "accrued property right" to Social Security benefits. However, the Court majority did stress:

> "This is not to say, however, that Congress may exercise its power . . . free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." (At 611)

Compare *Sherbert v. Verner,* 374 U.S. 398, 405 (1963), opinion by Justice Brennan (who dissented in *Nestor*); the Court (though citing the above quote from *Nestor*) undercut *Nestor's* view of the difference between rights and privileges.

Nestor is not the instant case. And we submit that the result in *Nestor* is ludicrous and unjust. Fortunately, this Court drifted away from its views in *Nestor* and, finally, completely rejected the philosophy upon which *Nestor* was based.

In *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), a statute allowing deportation for evading the draft was held unconstitutional as imposing punishments without due process of law. This was contrary to *Nestor* where he had been deported and deprived of Social Security because of his *past* communist activities. The dissenting justices said the majority opinion was contrary to *Nestor* (at 209).

Nestor has also been cited by dissenting justices in at least the following cases: *Rusk v. Cort,* 369 U.S. 367 (1962); *United States v. Brown,* 381 U.S. 437, 462, 467 (1965), where this Court, in affirming the Court of Appeals, held unconstitutional Section 504 of the Labor-Management Reporting and Disclosure Act of 1959; *Wells v. Rockefeller,* 394 U.S. 542, 550 (1969); and *Swann v. Adams,* 385 U.S. 440 (1967), where this Court held unconstitutional New York Congressional Redistricting and Florida Legislative Reapportionment, and *Shapiro v. Thompson,* 394 U.S. 618 (1969), where a Connecticut law denying welfare benefits to citizens who have not resided there one year was held unconstitutional. Compare *Heikkila v. Celebrezze,* 222 F. Supp. 629 (N.D. Calif. 1963), where the Court limited *Nestor* to its peculiar facts (at 631 and 632).

The rights-privilege distinction, upon which *Nestor* was based, may have been finally put to rest in *Goldberg v. Kelley*, 397 U.S. 254, 261 (1970). See also *Wheeler v. Montgomery*, 397 U.S. 280 (1970); and *Daniel v. Goliday*, 398 U.S. 73 (1970)

In *Belcher v. Richardson, supra*, the Court discussed *Nestor* in relation to *Goldberg v. Kelley*, as follows:

> "*Thus, we must conclude that the* concept espoused by the majority in *Nestor*, that one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, *is no longer to be considered a viable and controlling precedent for that principle, in view of* the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have recognizable property right to such benefits and one which is protected by all the safeguards of due process." (Emphasis ours; at 2014)

It is claimant's view that Congress never intended Section 224 to apply to lump sum setlements, such as received by him; in fact, Congress, in Subsection 224(b), expressly exempted such settlements from any Workmen's Compensation offset. (See discussion, *supra*, at pp. 7-8). However, the Secretary's refusal to properly construe and apply Section 224, unconstitutionally interferes with and impairs claimant's contract and property rights.

We ask this Honorable Court to carefully examine Section 224, as herein construed, in light of its own purpose and with regard to the expressed purposes of the Social Security Act and its Section 223 with which Section 224, as construed below, conflicts. This Court should then hold that Section 224 is contrary to the Fifth Amendment of the United States Constitution.

C. The Secretary's Failure to Apply Section 159 Of Public Law 90-248 in Computing Claimant's Earnings Presents Another Important Federal Question.

Prior to 1968, the computation of earnings for disability benefits and other Social Security benefits were limited to those earnings from which Social Security taxes were taken. For example, in 1967 the maximum earnings subject to Social Security taxes were $6,600.00.

Many persons, of course, earned more than said maximum amount. Claimant having had two jobs at the time of his injury, was one of such persons. (65)

The Congress of the United States did not think it fair or right for the disability benefits due such persons to be based only upon earnings subject to Social Security taxes. In December, 1967, Congress enacted, and the President signed, Section 159 of Public Law 90-248 to correct this situation. This amended Section 224 (a); compare Subsections 215(a),(c)(2) and(f)(2); and see 2 U.S. Congressional and Administrative News, 1967 at pp. 2834, 2835, 2847, 2873, 2874, 2883, 2884, 3046, 3047, 3060, and 3104) which state in part:

> "*Disability Benefits Affected by the Receipt of Workmen's Compensation.* The bill would modify one of the provisions in present law for determining the amount of combined social security and workmen's compensation benefits that can be paid when a disabled worker is eligible under both programs. In these cases, *the computation of average earnings could include earnings in excess of the annual amount taxable under social security.*" (at 2847; emphasis supplied)

Section 224 of the Act as amended by section 159 of Public Law 90-248 provides in pertinent part:

> "For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 223, or (b) one-sixtieth of the total of his wages and self-employment income (*computed without regard to the limitations specified in sections 209(a) and 211(b)(1)* for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest." (Emphasized words added by section 159, *supra,* effective for benefits for months after January, 1968; (86, 87)

The Secretary used $273.00 as the "average monthly wage", upon which the disability benefits were based. The Secretary justifies this by stating that it is higher than $245.00, the figure calculated by the Secretary to be claimant's highest monthly wage for the past five years.

The Secretary erroneously failed to take claimant's $709.00 *combined earnings* as the average monthly wage for disability income purposes. Secondly, the five-year average must also now reflect *both* jobs of claimant.

This Amendment was made effective in regard to any Social Security benefits to be paid after February, 1968. *(Ibid,* at 3104) The earnings of persons, such as claimant were to be recomputed after February 29, 1968 and higher benefits were to accordingly be paid. (See Historical Note after 42 U. S. C. A. Sec. 424a)

Increased benefits were to be paid to claimant whether or not his lump sum settlement is used to offset his Social Security disability benefits. (See 2 U.S. Cong. & Admin. News, 1967, at pp. 2873, 2874, 2883 and 2884)

The Secretary failed to apply said Amendment to claimant's earnings and to his benefits based upon such earn-

ings. This is impermissible. The evidence of claimant's two jobs and income was submitted to the Examiner. (65)

Before the Appeals Council, as the Secretary has admitted, claimant clearly and expressly requested recomputation. The Secretary, however, disregarded the Amendment and refused to make the required recomputation.

Claimant then brought suit and again expressly raised said issue. For example, the third Argument in claimant's Brief to the District Court and the third question presented the Court of Appeals was the same as this argument to this Court. Claimant's counsel, at the hearing before the District Judge, stressed this argument. The Secretary never answered this argument in his Brief nor orally. The Secretary ignored the issue as he had ignored the Amendment. Neither the Secretary nor the District Judge objected to claimant's raising this issue.

The District Judge, incredibly, in his Memorandum Opinion and Order of May 28, 1970, refused to consider this issue and stated that it never had been raised at the administrative level. (41, 42)

Claimant filed a Motion to Amend Findings and Judgment and for a New Hearing based upon the Court's decision on this argument. The Secretary in his Answer to Plaintiff's Motion to Amend Findings, challenged for the first time claimant's right to the recomputation, arguing that claimant had not produced evidence at the administrative level to support this conclusion.

Claimant did produce such evidence by his own statements and by furnishing supporting financial records. Furthermore, the Hearing Examiner found as a *fact* that claimant had been working two jobs. (65) There was sufficient evidence in the record to require such recompu-

tation. Had the Secretary really wanted more evidence, then he could have obtained it.

The District Judge, in denying claimant's Motion to Amend Findings, held that claimant's evidence of two jobs and the money earned at said jobs did not "fairly apprises the Secretary of claimant's claim that Section 159 of Public Law 90.248 was possibly applicable."[5] (47) But claimant *expressly* cited said Section 159 to the Appeals Council and asked that his earnings be recomputed.

Claimant respectfully submits that the District Judge (based upon his May 28 Opinion) overlooked claimant's evidence.

The Secretary must administer the Act in accordance with its beneficial purposes and ensure that a disabled worker receives his full benefits under the Statute. It is wrong for the Secretary to act as if disabled workers are somehow getting away with something when they receive their full benefits.

The Court of Appeals ignored this question. Thus, the lower Court has sanctioned the District Court's allowing the Secretary to avoid applying Section 159 of Public Law 90-248. While this practice may not present as far reaching a Federal question as the other issues, it is important that this Court exercise its supervisory powers and require the Secretary to consider and to apply Section 159 of Public Law 90-248 to claimant's claim for benefits.

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[5] Claimant did not ask the District Judge to usurp the administrative function. In claimant's Brief to the District Judge, we urged that the Court remand this case to the Secretary with instructions to recompute claimant's earnings and benefits as required by said Public Law 90-248.

CONCLUSION

The Constitutional issues are before this Court in at least three other cases. The lower court opinion conflicts with that of a three judge District Court in *Belcher v. Richardson,* Supreme Court No. 1091. The issues concerning the proper meaning and application of Section 224 of the Social Security Act are significant and substantial.

For the aforementioned reasons, Petitioner prays that his Petition for Writ of *Certiorari* to the Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

/s/ Jordan Rossen
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216

and

Eames, Petrillo, Wilcox,
and Kerwin
/s/ Leonard A. Wilcox, Jr.
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750
Attorneys for Petitioner

Dated: July 16, 1971.

APPENDIX A

OPINIONS OF COURTS AND AGENCIES

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT COURT

Johnney Benjamin, Plaintiff-Appellant

v.

Elliott L. Richardson, Secretary of Health,
Education and Welfare
Defendant-Appellee

No. 20,714

PER CURIAM ORDER

Decided and Filed April 29, 1971

Before: Weick, Peck and Kent, Circuit Judges.

This is an appeal from a judgment of the District Court affirming a decision of the Secretary of Health, Education and Welfare. After finding the claimant, the plaintiff-appellant herein, to be disabled within the meaning of the Social Security Act, the Secretary determined that the disability benefits to which the claimant would be entitled were required to be reduced pursuant to Section 224 of the Act (42 U.S.C. § 424) by the amount of a lump sum settlement received by the claimant under the Michigan Workmen's Compensation Act (Mich. Stat. Ann. 17.172). Claimant attacks both the factual correctness and the constitutionality of the Secretary's determination.

Section 224(a) of the Social Security Act (42 U.S.C. § 424 (a)) provides that when a claimant entitled to re-

ceive Social Security disability benefits also receives periodic disability benefits under a state workmen's campensation or like plan, a reduction in the Social Security benefits must be made by the amount in which the claimant's combined Social Security disability benefits and his workmen's compensation benefits exceed 80% of his previous average monthly earnings. Section 224(b) (42 U.S.C. § 424(b)) excludes from the reduction computation, however, any lump sum received by the claimant under a workmen's compensation plan unless the lump sum payment constitutes a "commutation of, or substitute for, periodic payments" under such plan. Therefore, the principal issue before the Secretary and the District Court was whether the lump sum received by the claimant here under the Michigan Workmen's Compensation Act constituted, in whole or in part, a "commutation of, or substitute for, periodic payments" under the Michigan plan. We agree with the District Court's conclusion that under Michigan law a "redemption" settlement of the type entered into herein always constitutes, in part, a commutation of periodic compensation payments. *Wehmeier v. W. E. Wood Co.*, 377 Mich. 176, 139 N.W. 2d 733 (1966). Thus it was incumbent on the claimant, as part of his burden of proof, to show any unpaid medical expenses, future medical expenses or any other amounts which should have been excluded from the lump sum. Other than certain unpaid medical expenses and attorney fees shown by the claimant, which the Secretary did exclude from the lump sum in making his reduction computation under Section 224, claimant failed to show any amounts which should have been excluded.

Claimant's alternative argument attacking the constitutionality of Section 224 of the Act raises issues previously considered and negatively resolved by this Court. *Lofty v.*

Richardson,....F. 2d ....(No. 20,484, decided and filed March 4, 1971). Accordingly,

It is ordered that the judgment of the District Court be and it is hereby affirmed.

Entered by Order of the Court
Carl W. Reuss,
Clerk

MEMORANDA OPINION AND ORDER OF MAY 28, 1970

By Hon. Damon J. Keith

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 32816

Johnney Benjamin, Plaintiff

v.

Robert H. Finch, Secretary of Health, Education, and Welfare, Defendant

Plaintiff brings this action pursuant to § 205(g) of the Social Security Act, 42 USC § 205 (g), for review of a final decision of the Secretary of Health, Education, and Welfare, that under the provisions of § 224 of that Act, 42 USC § 424, the disability insurance benefits to which plaintiff is entitled under § 223 of that Act, 42 USC § 423 must be reduced beginning April, 1967 by reason of plaintiff's receipt, pursuant to Michigan's Workmen's Compensation Law, of lump sum amount which the Secretary held to be "a commutation of, or a substitute for, periodic payments" which would have been otherwise payable under the Workmen's Compensation Law.

The Secretary of Health, Education, and Welfare moved the Court for summary judgment affirming his final decision; briefs and oral arguments were presented to the Court on the matter.

FACTS: On September 7, 1967, a Hearing Referee with the State of Michigan, Department of Labor, Workmen's Compensation Department signed a "Redemption Order" in a matter pending before it involving plaintiff and his employer which stated:

> "The agreement to redeem the employer's entire liability for an injury sustained by the plaintiff on April 20, 1966 by a single payment in lieu of weekly payments having been considered by a Hearing Referee of the Workmen's Compensation Department and it appearing that said agreement should be: (approved) (~~denied~~). [sic].
>
> Therefore, it is ordered that said agreement to redeem the employer's entire liability for weekly payments and medical benefits herein by the payment of $10,000.00 is approved."

The Appeals Council of the Federal Department of Health, Education, and Welfare, Social Security Administration reviewed that order entered by the Hearing Referee of the Workmen's Compensation Department of the State of Michigan and considered the effect it had on payment of disability benefits to plaintiff under the Federal Social Security Act. The Appeals Council held that:

> " . . . The lump sum payment which the claimant received constituted a substitute for periodic payments within the meaning of § 224 (b) of the Act.... Therefore, it is clear that the weekly payments were redeemed in accordance with the agreement of the

> parties whereby the lump sum discharged in full any liability for paying further periodic benefits. Thus, the lump sum was, within the meaning of § 224 of the Act, a substitute for periodic payments and, therefore, requires offset." (See Appeals Council Decision, Transcript p. 6.)

Accordingly, the disability benefits to which plaintiff was found entitled under the Social Security Act were reduced pursuant to the application of setoff provisions found in § 224 of the Act. (42 USC § 424 [a]), because of plaintiff's receipt of Workmen's Compensation Benefits.

ISSUES: Plaintiff presents three issues to this Court.

(I) Was the Workmen's Compensation received by plaintiff herein a lump sum payment exempt under § 224 (b) of the Social Security Act (42 USC § 424 [b] from the reduction provisions of § 224 (a) of the Social Security Act (42 USC § 424 [a]).

(II) Is § 224 of the Social Security Act (42 USC § 424) as construed by the Secretary unconstitutional?

(III) Did the Secretary fail to apply § 159 of Public Law 90-248 in computing claimant's earnings?

I. The Social Security Act provides in part that receipt of Workmen's Compensation benefits on a monthly basis by an individual under age 62 will result in a setoff against the payment of monthly Social Security benefits. (§ 224 Social Security Act; 42 USC § 424). The Act further states:

> "(b) If any periodic benefit under a Workmen's Compensation Law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum, except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction

> under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)." § 224 Social Security Act; 42 USC § 424 (b).

It is the position of plaintiff in this matter that the language of the section set out above clearly excludes from the control of the Social Security setoff provisions §224(a) of that Act (42 USC § 424 (a)) an amount paid under Michigan's Workmen's Compensation law which results from settlement or redemption of liability between an employee and his employer. Plaintiff contends that such redemptions or settlements do not constitute a commutation of, or substitute for, periodic payments, and therefore, under § 224(b) of the Act (42 USC § 424 (b)) any amount received by an employee from such redemption or settlement cannot effectuate a setoff in the payment of his Social Security benefit under § 224(a) of the Act (42 USC § 424[a]). It is plaintiff's position that any application by the Secretary of the setoff provisions enunciated in the Social Security Act against an amount received by way of redemption or settlement constitutes an unconstitutional application of those provisions, and results in deprivation of plaintiff's property without due process of law.

In order to determine the applicability of that provision of the Social Security Act which allows for a setoff of benefits upon receipt of an amount which constitutes a commutation of, or substitute for, periodic payments of Workmen's Compensation benefits under a state law, it is necessary to analyze the provisions of the Michigan law allowing for payment of an amount by way of redemption or settlement; whether or not such amount constitutes a commutation of weekly benefits depends on the characterization provided the payment by the state itself. Toward this

end, the Court will confine itself to the statutes and case law of the State of Michigan, though both parties have cited abundant law from outside the state.

The Michigan Statute allowing for the payment of one lump sum amount to an employee potentially covered under the State's Workmen's Compensation law reads as follows:

> "After 6 months time has elapsed from the date of injury, any liability resulting therefrom may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the compensation commission, and said compensation commission may at any time direct in any case, if special circumstances be found which in its judgment require the same, that the deferred payments due under this act be commuted on the present worth thereof at 5% per annum to 1 or more lump sum payments, and that such payments shall be made by the employer or the insurance company carrying such risk, or commissioner of insurance. When an application is made to redeem liability, the application may, within the discretion of the department be treated also as being an application for an advance lump sum payment.
>
> The filing of a petition for redemption or advance lump sum payment shall not be considered an admission of liability and in any case where the department treats any application for redemption as an application for advance lump sum payment under this section the employer shall be entitled to a hearing on the question of liability." CL 1948, § 412.22 (MSA §17.172).*

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* Repealed by Mich. P.A. 1969, No. 317; See CL 1948, § 418.835 (MSA § 17.237 [825]).

The Michigan Supreme Court recently addressed itself to an interpretation of that section of the statute set out above, in the case of *Wehmeier v. W. E. Wood Co.* (1966) 377 Mich. 176, wherein the state court briefly summarized the history of that section and the case law interpretating it. In the opinion of this Court, the characterization of redemption payments as enunciated by the State Court in *Wehmeier* resolves the issues presently before it.

A close reading of *Wehmeier, Supra* reveals that neither the majority nor the dissenting minority of the Michigan Supreme Court Justices questioned the fact that a redemption or settlement constituted, at least in part, a commutation of weekly benefits; the dispute among the members of that Court centered on the question of exactly what, in addition to the commutation of weekly benefits, was redeemed by the payment.

Indeed, in the dissenting opinion, Justice Souris explains that, "the legislature provided for redemption of weekly compensation payments. . . . " *Wehmeier, Supra,* p. 200-201. That sentence summarizes what is obviously the opinion of the entire Michigan Supreme Court Justices namely, that a redemption agreement always encompasses, in part, a commutation of weekly compensation payments. This Court cannot superimpose an opinion differing from the interpretation of the Michigan Workmen's Compensation Statute regarding redemption of agreeemnts as provided by the Michigan Supreme Court.

In view of the interpretation regarding redemption agrements pursuant to the Micrigan Statute (CL 1948 § 412.22 [MSA § 17.172]) as well as the order entered on September 7, 1967 by the Workmen's Compensation Hearing Referee of the State of Michigan allowing for redemp-

tion of "the employer's entire liability by a single payment in lieu of weekly payments . . . ". (See Exhibit 15, transcript p. 185), this Court holds that that which plaintiff received was, as a matter of law, a commutation of weekly benefits. Therefore, the setoff provisions found in § 224(a) of the Social Security Act (42 USC § 424 [a]) apply; the exclusion for certain lump sum amounts enunciated in § 224 (b) (424 USC 424 [b]) of that Act cannot apply where the lump sum is a commutation of a substitute for periodic payment.

II. The setoff provisions of the Social Security Act have been recently upheld as constitutional in the case of *Barbara Lofty v. Wilbur J. Cohen, Secretary of Health, Education, and Welfare* (Civil Action No. 30916, opinion rendered March 20, 1970, Judge Thomas P. Thornton, District Judge, Eastern District of Michigan). This Court agrees with the opinion expressed by Judge Thornton in that case and, inasmuch as plaintiff has failed to convince in this case that the setoff provisions, although constitutional, were unconstitutionally implemented, holds that there has been no showing that plaintiff was deprived of a property right without due process of law.

III. The final argument of plaintiff is that the Secretary has failed to apply § 159 of Public Law 90-248 in computing plaintiff's earnings in arriving at the benefit amount to be paid by the Social Security Administration. This Court has carefully reviewed the transcript of proceedings at the administrative level in the matter, and finds that nowhere was the Secretary presented with the claim that the benefit amount payable or the setoff applied under the Social Security Act was improperly computed. As the matter regarding the proper computation of the benefit amount has never been presented to the Social Security Administration, the Secretary has had no opportunity to consider and review that claim, and therefore this Court

is without jurisdiction at this juncture to address itself to that question. If there is some problem in the computations of the benefit amount to be received or the amount of the setoff to be applied under the Social Security Act, such questions must first be presented at the administrative level so that remedy may be made. Only if relief is denied, may this Court review the matter so as to ascertain the appropriateness of the Secretary's decision.

In view of the fact that this third issue has never been presented at the administrative level, this Court is without jurisdiction to hear any complaint regarding the Secretary's failure properly to compute the benefit amount or the setoff provision.

CONCLUSION:

This Court, therefore, having carefully considered the matters presented to it, holds that the setoff provisions of the Social Security Act are constitutional and were constitutionally implemented in this matter. In addition, this Court holds that it is without jurisdiction to hear complaints regarding the proper computation of the benefit amount applied under the Social Security Act, as such complaints were never presented at the administrative level.

ORDER:

Therefore, it is ordered that the Motion for Summary Judgment brought by the defendant in this matter requesting that the decision of the Secretary of Health, Education, and Welfare be affirmed, be and the same is hereby granted.

It is further ordered that the relief requested by the plaintiff be and the same is hereby denied.

Damon J. Keith,
U. S. District Judge.

ORDER DENYING MOTION FOR REHEARING OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Johnney Benjamin, Plaintiff,

vs.

Robert Finch, Secretary of Health, Education and Welfare, Defendant
Civil Action No. 32816

At a session of said Court held in the Courthouse in the Federal Building, Detroit, Wayne County, Michigan, on the 13th day of July, A.D., 1970;

Present: Honorable Damon J. Keith, U. S. District Judge.

Plaintiff moves the Court for a rehearing on the third issue presented in his Motion for Summary Judgment. That issue stated:

> "The Secretary has failed to apply Section 159 of Public Law 90.248 in computing plaintiff's earnings."

That section of the statute to which plaintiff refers states in essence that if an individual is entitled to Social Security Disability Benefits and Workmen's Compensation Benefits, his disability benefit will be reduced by the amount that the total of both benefits exceed 80% of his "average current earnings". (See Title 42 USC § 424[a]).

The statute goes on to state that:

> " . . . average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self employment income (computed without regard to the limitations specified in sections 409(a) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest." Title 42 USC § 424(a).

Interpreted, that definition means that for *purposes* only of *computing* the *reduction* in *benefits* the "average current earnings" may include income which was in excess of the yearly amounts of earnings taxed for Social Security benefits.* This interpretation is more clearly expressed in 1967 U. S. Code Congressional and Administrative, p. 2834 where it is stated that:

"The bill [Section 159 of Public Law 90.248] would modify one of the provisions in present law for determining the amount of combined social security and workmen's compensation benefits that can be paid when a disabled worker is eligible under both programs. In these cases, the computation of average earnings could include earnings in excess of the annual taxable under social security."

A careful review of the statute (Title 42 USC § 424(a)) convinces that "average current earnings" is the term used for that figure utilized only in the formula for computing the reduction due to receipt of both a Disability

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* Those taxable amounts as required to be reported by an employer or self-employed individual were:

1950—$3000; 1957-1954—$3600; 1954-1958—$4200; 1958-1965—$4800; 1965-1967—$6600; 1968—on, $7800.

Benefit and Workmen Compensation Benefit. It is not a term employed for or having any effect on computation of Social Security Disability amount. The new statutory definition of the term (as provided by Section 159 of Public Law 90.248) allows for inclusion of wages or self-employment in excess of yearly Social Security taxable amounts solely for purposes of computing the reduction *and not for purposes of computing* the benefit amount.

Prior to the enactment of Public Law 90.248 (effective February, 1968) there was no provision in the definition of "average amount earnings" for inclusion of yearly earnings in excess of those taxable amounts.

With this background in mind, the question before this Court is not whether the Secretary either failed to apply Public Law 90.248 but rather whether plaintiff adequately notified the Secretary that somehow the provisions of the amendment would apply favorably to him.

Plaintiff refers to parts of the record containing information that he had "two jobs" and that he had "actual earnings of $709.00". From this he argues that the Secreary was made aware that the provisions of § 159 of Public Law 90.248 were applicable. Nowhere does the record reflect that plaintiff alleged earnings in *any* year which exceeded the taxable amounts. Nowhere does the record reflect that plaintiff either challenged the amount of "average current earnings" used by the Secretary in computing the reduction, or asserted that the "average current earnings" should be higher.

It is apparent, understandably so, that plaintiff was throughout these proceedings more concerned that there was *any* reduction than he was interested in the manner of computing that reduction. However, the record shows that he was adequately alerted to that method of comput-

ing the reduction and never challenged the manner in which it was made nor asserted that his earnings in any given year exceeded the taxable amount so as to allow for higher "average current earnings."

On July 16, 1968 a letter was sent to plaintiff through his attorney wherein it was stated that:

> " . . . The law provides that total benefits payable on the social security account of a disabled beneficiary shall be reduced by the amount the combined social security benefits and workmen's compensation exceed 80 percent of the disabled beneficiary's average monthly wage as computed under the Social Security Act.
>
> The average current earnings are the higher of (1) the average monthly wage on which the disability amount is based, or (2) the average monthly wage based on the wage earner's five consecutive years of highest earnings after 1950.
>
> The average monthly wage on which Mr. Benjamin's disability is based is $273.00. His "high five" average monthly wage is $245.00. Eighty percent of $273.00 (the higher average monthly wage) is $218.40. Thus, Mr. Benjamin may receive no more than $218.40 from social security benefits and workmen's compensation payments combined for any month.
>
> . . . Since the $251.90 workmen's compensation payment exceeds 80 per cent of Mr. Benjamin's average current earnings by $33.50 ($251.90 minus $218.40), his month social security benefits of $107.00 were adjusted to none effective April 1967." See transcript, p. 177, Exhibit 9, p. 1-3.

If Mr. Benjamin believes that his "average current earnings" in computing an amount for reduction purposes are higher than the amount utilized by the Secretary, he has never raised that point below. This Court does not believe that a claim of "two jobs" or "monthly earnings of $709.00" in 1968 (which would amount to $7808.00 in a taxable year of $7800.00) fairly apprises the Secretary of plaintiff's claim that Section 159 of Public Law 90.248 was possibly applicable. If plaintiff truly believes his "actual current earnings" are higher, the computation can still be reviewed and amended by the Secretary.

In view of the above, this Court holds that plaintiff has failed to demonstrate a palpable defect by which the Court and the parties have been mislead and that a different disposition of the case must result from a correction thereof. (See Local Court Rule IX—A. 4, Motions for Rehearing).

Therefore, it is ordered that plaintiff's Motion for a Rehearing on the issue that the Secretary failed to apply Section 159 of Public Law 90-248 in computing plaintiff's earnings be and the same is hereby denied.

Damon J. Keith,
U. S. District Judge.

DECISION OF APPEALS COUNCIL

Department of
HEALTH, EDUCATION, AND WELFARE

Social Security Administration
Bureau of Hearings and Appeals

In the case of Johnney Benjamin, Claimant
Claim for Disability Insurance Benefits
Johnney Benjamin, Wage Earner

Social Security Account Number 247-48-2649

This case is before the Appeals Council on its own motion to review the hearing examiner's decision of December 3, 1968. The claimant and his representative, Leonard A. Wilcox, Jr., Attorney at Law, were advised of this action by the Appeals Council and of the claimant's rights in connection therewith.

In his decision, the hearing examiner found that the lump sum payment of $10,000 which the claimant received under the Michigan Workmen's Compensation Law, does not constitute a commutation of, or a substitute for, periodic payments and, therefore, the hearing examiner concluded that the receipt of this payment does not subject the claimant's disability insurance benefits to reduction as provided in section 224 of the Social Security Act.

The issue before the Appeals Council is whether the claimant's disability insurance benefits are subject to the "offset" provisions of section 224 of the Act by reason of the redemption payment received by the claimant.

The record reveals that on March 16, 1967, the claimant, who was born on September 17, 1931, filed an application

for disability benefits and alleged that he became unable to work because of a "disability" beginning April 20, 1966. It appeared that the claimant worked that evening at the Log Cabin Bar and following an earlier altercation a customer returned to the bar at closing time and shot the claimant. The claimant was found, after a hearing on October 25, 1968, to be under a "disability" within the meaning of the Act.

The claimant was awarded monthly benefits of $107 effective November 1966. However, under section 224 of the Act the disability benefit was reduced because of "offset" beginning April 1967 on the basis of notice received in that month that the claimant was entitled to workmen's compensation payments. The workmen's compensation payments of $58.13 per week began May 4, 1966 and were based on his combined weekly earnings of $87.20.

A further notice dated September 27, 1967 indicated that weekly payments of $58.13 were made for 51 weeks (April 21, 1966 to April 12, 1967) for a total of $2,964.63 and a Redemption Order dated September 7, 1967 was in the amount of $10,000.00.

The redemption order provided, in pertinent part:

> "The agreement to redeem the employer's entire liability for an injury sustained by the plaintiff on April 20, 1966 by a single payment in lieu of weekly payments having been considered by a Hearing Referee of the Workmen's Compensation Department and it appearing that said agreement should be: (APPROVED).
>
> Therefore, it is ordered that said agreement to redeem the employer's entire liability for weekly payments and medical benefits herein by the payment of $10,000.00 is approved.

It is further ordered that said sum be paid as follows:

$1,500.00 directly to Leonard A. Wilcox, Jr., attorney(s) for plaintiff for all legal services rendered, including all expenses in connection therewith,

$..... directly to.....
(specify type or none)

for medical expenses

$8500.00 directly to the plaintiff, being the balance."

Section 224 of the Social Security Act, provides, as pertinent here:

"(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 223, and

(2 such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has in a prior month, received notice of such entitlement for such month, the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under sections 223 and 202 for such month, and

(4) such periodic benefits payable (and actually paid) in such month to such individual under the

workmen's compensation law or plan, exceeds the higher of—

(5) 80 per centum of his average current earnings, or

(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section.

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is for commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)."

After careful consideration of the evidence, the Appeals Council believes and finds that the lump sum payment which the claimant received constituted a substitute for periodic payments within the meaning of section 224(b) of the Act. The weekly payments were redeemed in accordance with an agreement of the parties that was approved by the Workmen's Compensation Department of Michigan. The redemption order approved the agreement to redeem the employer's entire liability for weekly payments and medical benefits by a single payment of $10,000 (including $1500.00 for attorney's fee). Therefore, it is clear that the weekly payments were redeemed in accordance with the agreement of the parties whereby the lump sum discharged in full any liability for paying further periodic

benefits. Thus, the lump sum was, within the meaning of section 224 of the Act, a substitute for periodic payments, and, therefore, requires offset.

The amount to be offset would be $10,000 less $1500 attorney's fee and $350 medical expenses, a net amount of $8,150.

It is, therefore, the decision of the Appeals Council that the claimant's disability insurance benefits are subject to offset in accordance with the foregoing. The decision of the hearing examiner is accordingly reversed.

APPEALS COUNCIL

Irving Trager, Member
Jackson C. Smith, Deputy Chairman

Date: March 17, 1969

HEARING EXAMINER'S DECISION

Department of
HEALTH, EDUCATION, AND WELFARE

Social Security Administration
Bureau of Hearings and Appeals

In the Case of

Johnney Benjamin (Claimant)

Claim for—

Exemption from the Reduction provisions of Section 224 of the Social Security Act

Johnney Benjamin (Wage Earner)

247-48-2649 (Social Security Account Number)

Johnney Benjamin was shot in the back while in the employ of the Log Cabin Bar on April 20, 1966.

A Hearing Examiner of the Bureau of Hearings and Appeals issued a decision dated April 12, 1968 holding that claimant was 'disabled' under the provisions of Sections 216 and 223 of the Social Security Act. Claimant thereupon became entitled to benefits on his application for a period of disability and for disability insurance benefits.

Claimant also filed a claim against his employer for workmen's compensation. He received weekly periodic payments for about one year from April 20, 1966 to April 7, 1967 in the amount of $58.13 per week. On September 7, 1967 the Michigan Workmen's Compensation Department approved a Redemption Agreement executed by the parties providing that claimant will get a lump sum payment in the amount of $10,000—less an attorney's fee of $1500.

The Social Security Administration, in their Certificate of Social Insurance Award, applied the Reduction Provisions of Section 224 of the Social Security Act to claimant's social security benefits.

In essence, Section 224 of the Social Security Act was approved by the Congress of the United States to avoid duplication and pyramiding of benefits so that an individual cannot receive more money in a combination of benefits than he would have received if he continued to work.[1]

It is noted at this point that claimant's attorney was awarded an attorney's fee by the Hearing Examiner in the disability hearing. The effect of the reduction provisions of Section 224 was to reduce claimant's award to the point where the attorney's lien on the back award was insufficient to cover his fee. Consequently, the attorney had to look to his client for payment of the balance of his fee.

The Issues

The general issue before the Hearing Examiner is whether a reduction of the claimant's disability benefits because of a workmen's compensation payment is applicable under Section 224 of the Social Security Act, as amended.

The specific issue to be decided is whether or not the Redemption Agreement executed by the parties and approved by the Workmen's Compensation Department of Michigan is a lump sum payment subject to exemption from the Reduction Provisions of Section 224 of the Social Security Act.

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[1] Hearings before the Committee on finance—United States Senate on H.R. 6675 pps. 146-151 (Part I)

A constitutional issue has been raised by claimant's counsel inasmuch as he argues that his claimant has paid into the trust fund the same amount of money as other claimants but that his award would be smaller due to the reduction provisions of Section 224. Consequently, he argues that his claimant is being discriminated against in violation of the United States Constitution.

The Law

Reduction of Benefits Based on Disability on Account of Receipt of Workmen's Compensation

"(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a).

(42 USC 424(b); Section 224(b) Social Security Act)

The applicable Michigan statutes provide:

"Whenever any weekly payment has been continued for not less than 6 months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties subject to the approval of the compensation commission, and said compensation commission may at any time direct in any case, if special circumstances be found which in its judgment require the same, that the deferred payments due under this Act be commuted on the present worth thereof at 5

person per annum to one or more lump-sum payments and that such payment shall be made by the employer or the insurance company carrying such risk, or commissioner of insurance. When an application is made to redeem liability, the application may, within the discretion of the department be treated also as being an application for an advance lump sum payment. The filing of a petition for redemption or advance lump sum payment shall not be considered an admission of liability and in any case where the department treats any application for redemption as an application for advance lump sum payment under this section, the employer shall be entitled to a hearing on the question of liability."

(Michigan Statutes Annotated, section 17.172)

"Where the conditions of liability under this act exist, the right to the recovery of compensation benefits as herein provided, shall be the exclusive remedy against the employer."

(Michigan Statutes Annotated, section 17.144)

The facts are not in dispute. They show payments on a periodic basis for about one year. Then after a lapse of several months the redemption agreement was ratified by the Workmen's Compensation Bureau.

The employer has never conceded liability in this case. The mere fact that periodic payments are made is not a concession of liability per se. The payments were made on a voluntary basis. No hearing was held or decision made on the question of liability.

However, the Michigan Statutes provide that the exclusive remedy against an employer arises where the conditions of liability exist under the Workmen's Compensation

Law. In other words, the common law liability rules as to negligence are inapplicable.

In the facts of this case, the liability of the employer was not clear and persuasive. Claimants' attorney recommended the settlement to his client because of two issues which would have to be decided in a plenary hearing. These issues were whether or not the gunshot wound arose out of and in the course of claimant's employment. The other issue was a medical one and had to do with whether or not a functional overlay was disabling within the Workmen's Compensation Act.[2]

In accordance with procedures set up by the Workmen's Compensation Department, a hearing was held so that the Redemption Award could be considered by the Referee. The following exchange took place between the Referee and the claimant:

> "The Referee: Mr. Benjamin, as your attorney has explained to you, if you tried your case and you could show that as a consequence of your injury that you could not work you could collect compensation for every week that you were off work for the rest of your life because of the injury. You could also get medical treatment for your injury for the rest of your life. So you have got life-long coverage in terms of compensation for every week you are off work because of the injury, and even if you are working, if you need medical attention you could get that medical attention and have it paid for by the employer if it was proven that you received an injury at work and then, as a consequence, you needed medical attention. Now, you are

[2] Exhibit 16, page 3—Transcript of proceedings before a Referee of the Workmen's Compensation Department.

giving all that up in exchange for this settlement. And when you settle your case, if you settle your case and I approve it, you are giving up all your rights that you have against the Defendant here, the Log Cabin Bar, and closing the case against them.

A. Yes, sir.

The Referee: Do you understand that?

A. Yes, sir.

The Referee: And do you want to do that?

A. Yes.

The Referee: And do you realize that if you had some medical costs in the future that come about as a result of this injury that you will have to pay for those yourself and that the Company will not do it?

A. Yes. I talked that over with my wife.

The Referee: Okay. Do you want me to approve this settlement?

A. Yes, I do."

(Exhibit 16, pages 11, 12 and 13.)

It is clear from the statements of the Referee and of counsel that this lump sum award had all he earmarks of a settlement of a lawsuit rather than a substitute for periodic payments.

Now the Redemption Order signed by the Workmen's Compensation Referee had a printed paragraph which states that the agreement to redeem by a single payment was in lieu of weekly payments.[3]

However, this statement taken by itself does not show that this payment was a substitute for periodic payments. The Workmen's Compensation Department of Michigan has a procedure for an advance payment of benefits based

[3] Exhibit 15.

on actuarial formula.[4] There is no doubt but that an advance payment based on the formula would be a substitute for periodic payments.

Counsel for claimant has pointed out that the Michigan Statutes were recently revised to permit a Redemption Award without the prerequisite of a six month payment period. This would tend to show that Michigan Law no longer requires any periodic payments prior to the approval of a lump sum redemption award.

The facts of this case show that the defendant employer in the workmen's compensation case set forth various defenses as to liability in his answer to claimant's complaint.[5]

The lump sum settlement or Redemption Award was hammered out by the parties after some agonizing deliberation. Claimant's attorney recommended to the claimant that he accept this award since it would eliminate some of the risks of a non-suit in the event of a trial or plenary hearing.

Section 224(b) of the Social Security Act excludes from the reduction provisions a lump sum benefit payment. The payment of the $10,000 was a lump sum benefit payment.

Was this lump sum payment a substitute for or a commutation of periodic payments? The undersigned Hearing Examiner does not think so.

Therefore, the undersigned Hearing Examiner finds that the Redemption Award to Johnney Benjamin was a lump sum payment and not a substitute for a commutation of periodic payments.

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[4] Exhibit 22.

[5] Exhibit 12.

Claimant's counsel has attacked the constitutionality of Section 224 of the Social Security Act. The undersigned Hearing Examiner is called upon to administer the Social Security Act as a quasi-judicial officer. It is well established that an administrative officer has no authority to pass upon the constitutionality of an act which he is called upon to administer.[6]

The finding in this case is limited to the facts in the instant case. This decision does not stand for the general proposition that all Redemption Awards are lump sum payments and are subject to the Exemption Provisions of Section 224(b) of the Social Security Act.

Decision

The Reduction Provisions of Section 224 of the Social Security Act are not applicable to claimant's disability benefits.

/s/ Sidney J. Fenster
Hearing Examiner
2700 Broderick Tower Bldg.
Detroit, Michigan 48226

Date: December 3, 1968

[6] Public Utilities Commission v. U.S., 355 U.S. 534; 78 S. Ct. 446.

HEARING EXAMINER'S DECISION

Department of

HEALTH, EDUCATION, AND WELFARE

Social Security Administration
Bureau of Hearings and Appeals

In the case of
Johnney Benjamin (Claimant)

Claim for
Period of Disability and Disability Insurance Benefits

Johnney Benjamin (Wage Earner)
247-48-2649 (Social Security Account Number)

This case is before the Hearing Examiner pursuant to Section 205(b) of the Social Security Act, as amended, (42 USC 405(b)), hereinafter referred to as the Act, on a request for hearing filed on December 26, 1967 by Johnney Benjamin, the claimant herein, who is dissatisfied with determinations made by the Social Security Administration which initially and on reconsideration disallowed his application for a period of disability and disability insurance benefits under the provisions of Sections 216(i) and 223 of the Act (42 USC 416(i) and 423). The claimant's said application was filed on March 16, 1967 and it alleged that, because of an impairment described as "bullet lodged in back," he became unable to work on April 20, 1966.

A hearing, at which the claimant personally appeared and testified, was held on February 28, 1968 before the undersigned Hearing Examiner at Detroit, Michigan. The claimant was represented by his attorney, Leonard A. Wilcox, Jr., Esquire.

Issues Involved

The general issues in this case are whether the claimant is entitled to a period of disability and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Act.

The specific issue to be decided is whether the claimant, during the time he met the earnings requirement of the Act, became unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

Applicable Statutes and Regulations

Sections 216(i) and 223 of the Act, insofar as pertinent to this case, define "disability" as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Subsection (d) of Section 223 of the Act provides, in part, as follows:

> "(2)(A) An individual . . . shall be determined to be under a disability only if his physical or mental impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he

lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence . . . 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country. . . .

(3) For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory disgnostic techniques . . .

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."

Sections 216(i) and 223 of the Act further provide that an individual shall not be considered to be under a disability unless he was "a fully insured individual" and has social security credits for not less than 20 calendar quarters of work during a period of 40 calendar quarters ending in or after the calendar quarter in which he became disabled.

Sections 404.1502, 404.1015-404.1519 and 404.1523-404.-1524, inclusive, of Subpart P, Title 20 of the Code of Federal Regulations, indicate what proof is required to establish entitlement to disability insurance benefits under the Act and what standards will be applied for evaluating such evidence.

In substance, these sections of the Regulations provide that although primary consideration is given to the sever-

ity of the individual's medically determinable physical or mental impairment, consideration also is given to other factors such as the individual's age, education, training and work experience in determining his ability to engage in any substantial gainful activity. In evaluating the relative severity of an individual's medically determinable impairment, consideration is given, among other things, to how much the impairment affects his abilities to move about, handle objects, see, hear, speak, understand and reason.

Summary of Claimant's Testimony

The claimant testified substantially as follows:

He was born on September 17, 1931 in Hartsville, South Carolina. He completed 7 grades of school but when he was "around 17 years old" he dropped out of school and worked for a year for the Plain Glass Construction Company in Hartsville. That company was engaged in building 5 and 10¢ stores and the claimant worked as a general construction laborer for $2.25 per hour. In 1949 he moved to the Detroit, Michigan area and from 1949 to 1950 he worked as a laborer for $1.80 per hour for the New Haven Foundry, Mt. Clemens, Michigan. From 1950 to 1952 he worked at a salary of $60.00 a week for Ernie Grissom Ford, Warren, Michigan in the reconditioning of cars. That work involved putting old cars into "new" condition and the claimant's work was to clean the interior of the cars doing the necessary spraying, painting and waxing.

From 1952 to 1956 he worked as a machine operator at $2.79 an hour for the Chrysler Corporation, Warren, Michigan. He was laid off because of a strike and he obtained work in the reconditioning of cars for the Edmond Oldsmobile, Detroit, Michigan and for Krajenke Buick, Ham-

tramck, Michigan. He held down both jobs during the same period, 1956 to 1959, one job paying him $100.00 a week and the second job paying him $15.00 per car. From August 1959 to August 1962 he worked at reconditioning cars for Hi Dawson Ford, Detroit, Michigan at a salary of $110.00 per week. During part of that time, namely from 1960 to 1962, he also held down a second job reconditioning cars for Tommy C. Rector, Detroit, Michigan and was paid $15.00 per car. From August 1962 to August 1963 he worked for Bill Snethcamp in Detroit at $140.00 per week doing "painting and parts delivery." From August 1963 to April 20, 1966 he worked for Stark Hickey in Detroit at $80.00 a week, driving a "wrecker," lubricating vehicles, delivering parts and performing other general chores. From January 15, 1966 to April 20, 1966 he also worked as bar manager of the Log Cabin Inn, Southfield, Michigan at a salary of $100.00 a week. During those months he worked for Stark Hickey from 7 a.m. to 3:30 p.m. and then at the Log Cabin Bar until 2:30 or 3 a.m.

Shortly after midnight of April 20, 1966 a customer at the Log Cabin Inn threatened the claimant with violence and the claimant put in a call for the police. Before the police arrived the claimant was shot in the back. He was taken by the police to the Henry Ford Hospital where he remained until May 3, 1966. He was told by the doctors in the hospital that a bullet was lodged in his spine at about the location of his 8th thoracic vertebra and that the surgical removal of the bullet might result in a permanent paralysis. It therefore was decided not to remove the bullet and it continues to be lodged against his spine.

When he was discharged from the hospital on May 3, 1966 he was told that he could go back to work.

Although the owner of the Log Cabin Inn refused to give him any employment he obtained work as a laborer

for the Braver Lumber Company in Detroit and he reported for work there on September 9, 1966. However, after he had worked only two hours he "passed out" on the job. He was taken to Dr. John B. Greene where he had an X-ray taken. Dr. Greene told him that the X-ray showed a bullet lodged "near his spine." The doctor told him that he was not "quite healed" inside. After several months, when he felt he might be strong enough to return to work, he applied for a job at several places, one of them being the Ford Motor Company Rouge Plant, Gate 6. He was given a physical examination but was refused employment because of the bullet in his back. He also went to the Dodge Plant where he was given a physical examination and again refused employment because of the bullet in his back. Other companies where he applied for work also turned him down. He frequently was told that he was not a good insurance risk for employment. He finally did obtain employment at the Ditzler Auto Painting Company in Detroit on April 1, 1967 at a salary of $90.00 a week, his job being to mix paints. He found that he could not tolerate the paint fumes, however, and he was assigned to driving a truck. As that work also involved loading and unloading containers of paint he quickly discovered that he was not able to do any lifting so had to give up his employment with the Ditzler Auto Painting Company on April 15, 1967. Subsequently the Braver Company promised to give him "light" work, so he started work there in August 1967. However, certain "heavy" tasks later were assigned to him, such as picking up kegs of nails, which he found he could not do. Whenever he tried to lift a keg of nails he "could feel the bullet in his back, and sharp pains would radiate from his back up and down his spine and into his right shoulder." The bullet "feels like a ball bearing and hurts all the time," particularly when he

"leans over." He had to quit work at the Braver Lumber Company after being there only one month. He next found employment with the Michigan Automotive Replacement Company as a truck driver and "handling stock" at a salary of $80.00 a week. As this work also involved the loading and unloading of the truck he drove, such loads including batteries, crankshafts, spark plugs, etc., he found the work too exhausting and he had to quit that job on December 15, 1967.

His next employment was for Floyd Rice, a Ford Dealer in Detroit, at a salary of $85.00 a week, "driving cars." In this work he is not required to do anything except work as a "carhop" which merely involves driving a car out of the dealer's yard and taking the customers to their homes. On this job he works from 3:30 p.m. to midnight, five days a week. He started work for Floyd Rice on January 2, 1968 and has continued to work there ever since. He obtained this job through his friend, Paul Garagan, the service manager for Floyd Rice. Mr. Garagan had been accustomed to stop at the Log Cabin Inn to "have a few beers" after he got off work at midnight at Floyd Rice's. He and the claimant became acquainted and developed a friendship. After the claimant was injured and became unable to return to work at the Inn or to do any heavy physical work Mr. Garagan told the claimant that he could have a job with Floyd Rice as long as Mr. Garagan was the service manager there, and that his job there would only involve driving cars and would not include any heavy lifting or other physical labor. However, Mr. Garagan warned the claimant that Mr. Garagan's boss might not approve of the claimant's employment if it became known that the claimnt only had to drive cars whereas the other "carhops" who worked for Floyd Rice had additional duties which involved some hard physical labor. Consequently,

the claimant does not know how long he may be able to continue to work for Floyd Rice.

The claimant further testified that he has been married since 1950 but has no children. He always liked to work very hard and earn as much money as possible. He has often had two jobs at the same time, and as soon as he completed his hours of work on one job he would go to his second place of employment and work another full period. Since his injury on April 21, 1966, however, he has not been able to do any of the various types of work he had done previously. Not only is he unable to do any lifting but he is restricted in his ability to bend, stretch or twist around, as is required in the work of "reconditioning cars." Furthermore, he is not able to tolerate paint fumes. Furthermore, ever since his injury in the Log Cabin Inn, he has been very "nervous": he "cannot stand any work where there is too much noise": and he is "frightened of cars and would be afraid to go back to work in a bar." Every time he hears about someone being shot it brings back the memory of his experience. The area where the bullet is lodged "aches all the time." The pain "throbs like a toothache."

His daily medication includes "nerve pills," "water pills" and "pain killers," as prescribed by Dr. G. L. Caldwell.

Counsel for the claimant stated that he had served as the claimant's attorney in the preparation, filing and prosecution of a claim against the Log Cabin Inn for Workmen's Compensation under the Michigan State Workmen's Compensation Law; that after the claimant had been paid Workmen's Compensation for more than six months, and before the case had been completely litigated before the Workmen's Compensation Board, the claimant and the St. Paul Insurance Company, which was the insurance carrier

for the Log Cabin Inn, entered into a redemption agreement which was subsequently approved after hearing by the Workmen's Compensation Board; and that the claim was redeemed for a cash payment of $10,000. Counsel for the claimant further stated that there was never a finding by the Workmen's Compensation Board that the claimant was "totally disabled."

• • • • •

Decision

Accordingly, it is the decision of the Hearing Examiner that the claimant Johnney Benjamin, based on his application filed on March 16, 1967, is entitled to a period of disability beginning on April 20, 1966 and to disability insurance benefits under the provisions of Sections 216(i) and 223, respectively, of the Social Security Act, as amended.

/s/ Milton C. Ferguson,
Hearing Examiner

Date: April 12, 1968

DECISION IN LOFTY v. RICHARDSON

No. 20484

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Barber Lofty, Plaintiff-Appellant

v.

Elliott L. Richardson, Secretary of Health, Education and Welfare, Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed March 4, 1971.

Before: Edwards and Miller, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

Edwards, Circuit Judge. In this case appellant attacks the constitutionality of an amendment to the Social Security Act adopted in 1965 (42 U.S.C. § 424(a), *as amended,* (Supp. V, 1969)) which had the effect of reducing a claimant's Social Security disability benefits by the amount of Workmen's Compensation benefits received by him where the total received under the two programs exceeded 80% of his previous average monthly wages. Appellant claims this provision violates the due process clause of the United States Constitution because when Congress made Workmen's Compensation the only subject for such deductions, it thereby created a patently arbitrary classification.

We begin our consideration of this case, as indeed we must, with the Supreme Court's last ruling upon an invidious classification argument in a Social Security case.

> "This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance

> to fall within the protection from arbitrary government action afforded by the Due Process Clause. In judging the permissibility of the cut-off provisions of § 202 (n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.' *Helvering v. Davis, supra,* at 644. Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, *we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Flemming v. Nestor,* 363 U.S. 603, 611 (1960). (Emphasis added.)

Since we cannot say that the classification herein attacked was "utterly lacking in rational justification," we cannot hold as appellant asks that Congress was without power to pass the 1965 amendment.

Claimant in this case was granted total and permanent disability benefits under the Social Security Act starting in 1966. In June of 1966 he accepted a lump sum "redemption settlement" in full payment of his Workmen's Compensation claim arising out of the same injuries which produced his total and permanent disabiilty for Social Security benefits.

Taking into account the Workmen's Compensation settlement, the Secretary reduced claimant's Social Secu-

rity benefits from $269.80 a month to $25.80 per month for 44 months, or until the Compensation settlement had been exhausted at the rate of $57 per week. This action was taken under 42 U.S.C. § 424(a), *as amended,* (Supp. V., 1969), which placed a limit of 80% of claimant's previous average monthly earnings upon the total of Social Security and Workmen's Compensation benefits which he was to receive. Section 424(a) required that only the difference, after deduction of Workmen's Compensation benefits, should be paid by Social Security.

This reduction formula was adopted by Congress in 1965, effective January 1, 1966. Much of the testimony which preceded its adoption argued that double disability benefits close to or exceeding prior earnings defeated the purpose of motivating injured beneficiaries back toward productive work and tempted the states to reduce or eliminate Workmen's Compensation benefits and throw full responsibility on the national Social Security scheme.

The amendment enacted by Congress is now attacked, not because the purposes claimed for it might not be arguably rational grounds for congressional action, but because Congress in establishing the reduction provision referred to above did not also include such benefits as private insurance proceeds and benefits resulting from damage suits in civil courts. It is claimed that existence of these benefits without deductions makes the selection of Workmen's Compensation as the only deduction against Social Security benefits an arbitrary and capricious classification which cannot stand when tested against the due process clause.

The District Judge who heard this case below dismissed it with a brief opinion which cited the reasons for the amendment referred to above and held that "it is there-

fore reasonable to preclude a claimant from receiving amounts as a result of retirement or disability far in excess of his earnings received while working." The District Judge held that the classification involved herein was not patently arbitrary within the meaning of *Flemming v. Nestor*, 363 U.S. 693 (1960).

We have already set forth above the essential holding of the *Flemming* case upon which the District Judge based decision. But there is a good deal of case law which serves to illustrate the breadth of legislative power accorded the Congress (or the states) by the Supreme Court's interpretation of the constitutional limitations contained in the due process and equal protection clauses.

In the following two cases, former Chief Justice Warren wrote for the Court:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552; *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96." *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). (Footnotes omitted.)

> "[S]ome basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protec-

tion Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See *McGowan v. Maryland,* 366 U.S. 420 (1961); *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552 (1947); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Ozan Lumber Co. v. Union County National Bank,* 207 U.S. 251 (1907)." *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 809 (1969).

Even more recently Justice Stewart dealt with a somewhat similar classification argument:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsey v. National Carbonic Gas Co.,* 220 U.S. 61, 78. 'The problems of government are practical ones and

> may justify, if they do not require, rough accomodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland,* 366 U.S. 420, 426". *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

With these rules pertaining to legislative power before us,[1] we turn directly to the background and purpose of the disputed amendment.

The legislative record plainly shows that Congress had the Workmen's Compensation-Social Security overlap before it as a problem for a decade. When the Social Security Act was first passed in 1935, it provided no disability benefits. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620 et seq., (42 U.S.C. § 301 (ff)). When benefits for total and permanent disability were first added in 1956, Congress did require the offset of Workmen's Compensation Act of Aug. 1, 1956, Pub. L. No. 880, 70 Stat. 816-17.

Two years later, however, acting on the assumption that the impact of the duplication was relatively slight, the offset provision was repealed. Act of Aug. 28, 1950 Pub. L. No. 85-840, Sec. 206, 72 Stat. 1025.

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[1] The *McGowan, McDonald* and *Dandridge* cases are, of course, attacks upon state statutes, wherein appellant's reliance was upon the equal protection clause of the Fourteenth Amendment. As to an assertion of an arbitrary classification argument, there is a wide area of overlap between the effect of the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

If there be a difference between the effect of these two clauses, it would appear that since the equal protection clause is the more "explicit" of the two clauses, the cases quoted above would apply a fortiori to this attack upon a federal statutory classification where reliance is had on due process.

In the years which followed it is clear that Congress received a great number of complaints about the repeal of the offset. These complaints—the overwhelming majority of them originating with large employers or large employer organizations—lead to reenactment of the Workmen's Compensation offset (in somewhat different form) in the Soc. Sec. Amendments of 1965, eff. Jan. 1, 1956, Pub. L. No. 89-97, Tit. III, § 335, 79 Stat. 406, 42 U.S.C. § 424(a), *as amended*, (Supp. V, 1969).

Hearings were held before adoption of Section 424(a) only in the Senate—but the record there amply serves to indicate the rationale of its advocates. Thus L. J. Dikovics, representing the Council of State Chambers of Commerce, told the Senate subcommittee:

> Thousands of disabled workers today are receiving more tax-free income from social security disability benefits combined with State workmen's compensation benefits than they were earning before they became ill or were injured. Section 303 would add many more thousands to this number. When tax-free social insurance benefits exceed earning power there is little incentive for a disabled person to accept the risk, pain, and struggle involved in attempting to become self-supporting again.
>
> A matter of equal concern is the impact of Federal disability payments on State workmen's compensation programs. Legislative proposals have been offered in several States (Colorado, Florida, Maryland, and Minnesota) to reduce workmen's compensation benefits by the amount of OASI disability benefits payable to a disabled worker. If other States follow this direction and section 303 of this bill is enacted, we believe it will be only a matter of time until State workmen's compensation programs are destroyed.

> If that happens, a major impetus for this country's remarkable achievements in occupational safety will be destroyed also. Workmen's compensation insurance costs are based on the actual loss experience of industry groups and of individual employers. This gives the employer a direct financial incentive to improve safety on the job. If workmen's compensation costs are absorbed into the social security program, employers without safety programs and those whose employment is hazardous would pay no more than those employers who have adopted safety programs or who have less hazardous employment. We strenuously object to any action which could have an adverse effect on safety programs and on the remarkable downswing in disabling accidents that has taken place over the last three decades. Hearings on H.R. 6675 Before the Senate Com. on Finance, 89th Cong., 1st Sess., p. 259 (1965).

And J. Dewey Dorsett, representing the American Insurance Association, presented a table purporting to show that continued duplication of benefits under terms of the then pending bill would mean at least some payments in excess of prior average "take home pay" in every state, and up to a maximum of 247% in the instance of Arizona.

Chart I.—*Duplication of workmen's compensation disability benefits by social security benefits in H.R. 6675*

State	Combined workmen's compensation and social security benefits [1]	average weekly take-home pay [2]	Workmen's compensation maximum weekly benefit [3]	Combined benfits percentage of take-home pay
Alabama	$ 96.62	$ 67.96	$ 38.00	142
Alaska	172.00	130.10	100.00	132
Arizona	222.10	90.06	152.50	247
Arkansas	92.05	65.16	35.00	141
California	142.00	101.21	70.00	140
Colorado	111.60	86.55	43.75	129
Connecticut	127.77	88.35	59.00	145
Delaware	113.97	79.30	50.00	144
District of Columbia	137.48	86.30	70.00	159
Florida	101.26	69.05	42.00	147
Georgia	94.97	66.74	37.00	142
Hawaii	142.85	87.11	75.00	164
Idaho	110.26	81.56	45.00	135
Illinois	122.85	86.73	55.00	142
Indiana	108.97	78.94	45.00	138
Iowa	105.60	78.08	42.00	135
Kansas	107.26	81.38	42.00	132
Kentucky	102.38	73.59	41.00	139
Louisiana	98.14	77.12	35.00	127
Maine	100.62	67.32	42.00	149
Maryland	119.43	79.58	55.00	150
Massachusetts	137.18	83.50	71.00	164
Michigan	149.77	89.01	81.00	168
Minnesota	111.18	83.14	45.00	134
Mississippi	89.46	63.08	35.00	142
Missouri	111.93	79.60	47.50	141
Montana	114.31	88.08	46.00	130
Nebraska	103.60	77.76	40.00	133
Nevada	125.96	98.76	57.20	127
New Hampshire	104.72	70.40	45.00	149
New Jersey	111.55	84.68	45.00	132
New Mexico	108.77	88.61	40.00	123
New York	127.48	85.89	60.00	148
North Carolina	93.81	65.14	37.50	144
North Dakota	109.80	73.71	51.00	149
Ohio	121.73	91.68	56.00	133

State	Combined workmen's compensation and social security benefits [1]	average weekly take-home pay [2]	Workmen's compensation maximum weekly benefit [3]	Combined benfits percentage of take-home pay
Oklahoma	100.18	76.41	37.50	131
Oregon	121.29	[4]85.81	57.69	141
Pennsylvania	113.68	83.88	47.50	135
Rhode Island	109.43	79.54	45.00	138
South Carolina	90.38	63.93	35.00	141
South Dakota	101.60	78.40	38.00	130
Tennessee	96.80	68.07	38.00	142
Texas	98.14	77.06	35.00	127
Utah	122.40	90.41	52.80	135
Vermont	103.26	69.00	44.00	150
Virginia	98.26	69.52	39.00	141
Washington	122.57	[4]89.40	57.69	137
West Virginia	100.31	[4]82.88	38.00	121
Wisconsin	130.18	83.50	64.00	156
Wyoming	118.51	[4]84.37	55.38	140
Longshoremen's Act	114.67	[5]	70.00	.....

[1] Compensation benefits for temporary total disability payable to a worker with a wife and 2 children. Social Security benefits provided in H.R. 6675 medicare bill, pp. 164-165.

[2] Average weekly wages less Federal income and social security taxes (4 deductions). Based upon wages of employees to whom compensation paid, July 1964—National Council on Compensation Insurance.

[3] As of May 1965. Includes, maximum allowance for temporary total disability for worker with a wife and 2 children. (Michigan and New York reflect benefit incheases contained in bills that have passed their legislature.)

[4] Figures not available to National Council on Compensation Insurance for monopolistic State fund. Source: Production workers in manufacturing—1960 Statistical Supplement, Monthly Labor Review, pp. 33-35 (U.S. Department of Labor).

[5] Figures not available—varies in each State.

Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess., p. 898 (1965).

It is clear that employer advocates of the offset amendment outweighed their opponents in numbers of spokesmen and of exhibits entered. But an opposing point of view was presented by the Secretary of Health, Education and Welfare and two of his top associates who sought to delay enactment of any change until a more thorough study had been made.

Senator Lehman. Senator, I think yesterday I explained that the Advisory Council on Social Security, which made a report recently, asked that a study be made and the House Ways and Means Committee in their report also directed us to make a study of the extent and effects of the overlap between social security and workmen's compensation and to report by December 1965. I think I stated yesterday that perhaps 2 percent of the disability beneficiaries under social security also receive workmen's compensation, and that there were many factors that had to be considered in connection with this question. This issue has to be studied in depth.

I can't give you an off-the-cuff opinion on it, but let me tell you what some of the basic problems would be.

First of all, if at the time of disability the man has a low-paying job, of course, that would have a bearing upon the amount of benefits he would receive.

Then, if a man is totally disabled as of a certain period, even though under a combination of workmen's compensation and our social security disability benefits he may receive more than his wages were, I think we have to give some consideration to the fact that had he not been disabled his wages would have been substantially

[2] Hon. Anthony J. Celebrezze, now a judge of this court.

higher, say, 10 or 15 years later, and to find a way of taking account of that fact.

Another element is that the Congress of the United States in 1958 repealed the offset provision that had been in effect because it presented a great many technical and administrative problems. In certain cases, the offset provision resulted in delays in paying disability benefits because of the slow process, in some instances, of determination under workmen's compensation and because we couldn't move until we knew what the amount of compensation was when the award had been made.

So there are many problems that have to be staffed out and thoroughly considered.

I think the House Ways and Means Committee in its wisdom arived at the right conclusion—that there is a need for the Social Security Administration to make a thorough study of this question and to report back to Congress by December of 1966. Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess., p. 146 (1965).

However persuasive this statement might appear to us, it is clear that the Senate committee did not desire to wait. Its report on which subsequently the Senate and then the House acted favorably provided:

(b) Reduction of disability benefits on account of receipt of workmen's compensation benefits

The committee has taken note of the concern that has been expressed by many witnesses in the hearings about the payment of disabiilty benefits concurrently with benefits payable under State workmen's compensation programs. While data of the kind requested by the House Committee on Ways and Means in its

report on this bill are not now available, the committee believes that amendatory legislation should not await completion of the requested study. Although there is some dispute as to the number of workers who receive benefits under these two programs and whether these payments are excessive, the committee believes that it is desirable as a matter of sound principle to prevent the payment of excessive combined benefits.

The committee believes that the provision it is recommending avoids the problems and inequities of the earlier offset provision in the social security law for reducing monthly disability benefits by the amount of any other benefit to which a worker was entitled under State workmen's compensation laws, which was in effect from July 1957 to July 1958, but was repealed then. The new offset provision recommended by the committee provides for a reduction in the social security disability benefit (except where the State workmen's compensation law provides for an offset against social security disability benefits) in the event the total benefits paid under the two programs exceed 80 percent of the worker's average monthly earnings prior to the onset of the disability. Under this provision, the worker's average monthly earnings would be defined as the higher of *(a)* his average monthly wage used for purposes of computing his social security disability benefit or *(b)* his average monthly earnings, in employment covered by social security during his highest 5 consecutive years after 1950. (In no event, however, would the total benefits payable with respect to a worker be reduced below the amount of the unreduced monthly social security benefits). This reduction formula would generally avoid the inequity encountered under the previous offset provision, where

> the reductions that were required frequently resulted in benefits that replaced no more than 30 percent or so of the worker's earnings at disablement. S. Rep. No. 404, 89th Cong., 1st Sess., p. 100 (1965).

This then brings us to consideration of appellant's argument that the disputed amendment represents "a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor,* 303 U.S. 603, 611 (1960), and hence must be declared void. It seems to us that the result contended for by appellant would represent a very narrow construction of the congressional power to enact, amend and modify social legislation as required by the circumstances reported to Congress concerning its operation. If (as appellant concedes) the rationale for preventing double coverage is a reasonable one (whether we might individually agree with it or not) then we believe that Congress also had the right to make it applicable to Workmen's Compensation claimants and not to do so as to recipients of damage action judgments and private insurance proceeds.

The legislative history of this amendment shows a great many complaints were registered before Congress about Workmen's Compensation-Social Security double coverage. The record is devoid of any complaints at all about double coverage resulting from private insurance or negligence actions in courts. It is neither novel nor necessarily irrational for Congress to fail to act upon a problem about which they have received no complaints and have ben supplied no information, even when Congress, as here, does act upon a somewhat parallel problem as to which it had both.

Still another reason which might reasonably be conceived to justify the congressional classification is that adminis-

tratively it would be relatively simple to enforce the Workmen's Compensation deductions, whereas separating out the wage benefits from civil damage judgments, or determining who had received private insurance benefits, might offer administrative problems of a serious nature.

Finally, it is entirely conceivable to us that Congress may have considered Social Security benefits and Workmen's Compensation benefits to be more arguably duplicative of one another than could appropriately be claimed concerning Social Security benefits and the other two types of payments. Both Social Security and Workmen's Compensation programs are social welfare legislation. Private accident or disability insurance is a private contract, frequently paid for entirely by the recipient. And, of course, court awards for injuries are private rights derived from the common law involving the principle of compensation for negligence or fault.

Most of the argument for the Workmen's Compensation offset came from employers who generally pay all of the costs for Workmen's Compensation and half of the costs of the Social Security benefits. Their argument before Congress was that they were paying twice for the same injury. This argument would have, of course, no merit at all in relation to a damage action award or to the proceeds of privately purchased accident or disability insurance.

As we have aleardy indicated, our conclusion is that Section 424(a) does not violate the due process clause of the United States Constitution.

As to the other two issues presented in appellant's brief, we affrm the judgment of the District Court for the reasons set forth in the opinion of the District Judge.

The judgment of the District Court is affirmed.

APPENDIX B

Section 224 of the Social Security Act

(42 U.S.C.A. 424a, Pub. L. 89-97, Title III, 335, 79 Stat. 406, Amended Jan 2, 1968, Pub. L. 90-428, Title I, 159 (a) 81 Stat. 869)

(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent) and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of—

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of—

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entiled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b) (1) of this title) for the five consecutive calendar years after 1950 for which such wages and self employment

income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409(a) and 411(b) (1) of this title, the Secretary under regulations shall estimate the total of such wages and self-employment income for purposes of clause (B) of the preceding sentence on the basis of such information as may be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations.

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title, but before deductions under such section and under section 422 (b) of this title.

(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title.

(e) If it appears to the Secretary that an individual may be eligible for periodic benefits under a workmen's compensation law or plan which would give rise to reduction under this section, he may require, as a condition of certi-

fication for payment of any benefits under section 423 of this title to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Secretary may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim, or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 405(i) of this title.

(f) (1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 423 of this title and any benefits under section 402 of this title based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Secretary shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this subchapter on the basis of such individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1) of this subsection, the individual's average current earnings (as defined in subsection (a) of this section) shall be deemed to be the product of his average current earnings as initially determined under subsection (a) of this section and the ratio of (i) the average of the taxable

wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to (ii) the average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 shall be reduced to the next lower multiple of $1.

(g) Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefits, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5105

JOHNNEY BENJAMIN, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

1. Petitioner, a resident of Michigan, was awarded monthly social security disability benefits, beginning in November 1966, of $107.00 (later statutorily increased to $121.00). But, because he received $58.13 a week in state workmen's compensation and later received a lump sum workmen's compensation settlement of $10,000.00, the Secretary, acting pursuant to Section 224 of the Social Security Act, 42 U.S.C. (Supp. V) 424a, withheld all but $14.00 from those monthly benefits until his workmen's compensation was exhausted.

After exhausting his administrative remedies, petitioner brought this action in the district court, alleging that: (1) the workmen's compensation settlement was a lump sum payment exempt under Section 224

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(b) from the reduction provisions of Section 224(a); (2) alternatively, Section 224 deprived him of due process of law as guaranteed by the Fifth Amendment; and (3) the Secretary had failed to apply Section 159 of Public Law 90-248, Social Security Amendments of 1967, which provided for the use of all a claimant's earnings in computing his "average current earnings" for purposes of Section 224.[1] The district court held that: (1) the lump sum settlement was a commutation of petitioner's weekly workmen's compensation benefits and, therefore, that the Section 224 reduction provisions were applicable; (2) Section 224 was constitutional; and (3) petitioner had failed to allege before the hearing examiner or to show at the administrative hearing that his "average current earnings" used in computing the reduction should have been higher (Pet. App. 35-47). Accordingly, the district court granted judgment for the Secretary, and the court of appeals affirmed (Pet. App. 33-35).

2. The constitutional issue raised by petitioner—whether Section 224 arbitrarily discriminates against

[1] Section 224 defines an individual's "average current earnings" as the larger of the average monthly wage used for purposes of computing his benefits under 42 U.S.C. 423 or one-sixtieth of his total wages and self-employment income for the five consecutive years after 1950 when they were the highest. Section 159 of Public Law 90-248, 81 Stat. 869, changed this clause to provide that when an individual's wages and self-employment income for the five consecutive years during which they were the highest are used to compute his "average current earnings," then his actual earnings, rather than those earnings creditable for purposes of social security (which have an upper limit), are to be used.

workmen's compensation beneficiaries (Pet. 18–22)—is presented in three cases now pending before this Court. *Richardson* v. *Belcher*, No. 70–53 (probable jurisdiction noted, 401 U.S. 935); *Bartley* v. *Richardson*, No. 70–12; and *Lofty* v. *Richardson*, No. 70–215. Since the decisions in those cases will be dispositive of petitioner's claim, the Court may wish to defer action on the petition pending those decisions.[2]

There is no merit to petitioner's claim that Section 224 unconstitutionally impairs his workmen's compensation settlement contract (Pet. 23). Section 224 requires the reduction only of social security benefits received by a workmen's compensation beneficiary, and has no effect upon petitioner's workmen's compensation.

3. Petitioner's claim that the lump sum settlement was not a commutation of or a substitute for periodic workmen's compensation benefits, but rather was a "redemption" which is exempt under Section 224(b) from reduction (Pet. 7–9), was considered and rejected by both courts below (Pet. App. 33–34, 37–41). Further review of the issue by this Court is not warranted.[3]

4. Petitioner's final claim—that the Secretary, in computing petitioner's "average current earnings" for

[2] Similarly, decision in the *Belcher* case will be dispositive of petitioner's claim that *Flemming* v. *Nestor*, 363 U.S. 603, no longer constitutes a viable precedent (Pet. 24–26).

[3] Likewise, petitioner's claim that the Secretary, in computing the reduction, should have excluded from the lump sum his *future* medical expenses, which were not specifically determined, was considered and rejected by the court of appeals and does not warrant further review (Pet. App. 34).

purposes of the reduction, failed to use petitioner's figure of $709.00 as his average monthly wage, in violation of Section 159 of Public Law 90–248 (Pet. 27–30)—is without substance. The district court expressly rejected this claim as unfounded, pointing out that petitioner had failed to produce at the administrative level evidence of *yearly* earnings in support of the $709.00 figure and that the Secretary thus had computed his average monthly wage from the income figures for petitioner on file with the Social Security Administration (Pet. App. 43–47). The court left open to petitioner the opportunity to present further evidence to the Secretary on this issue if "plaintiff truly believes his 'actual current earnings' are higher" (Pet. App. 47).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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